No. 14-462

Title:	DIRECTV, Inc., Petitioner
	v.
	Amy Imburgia, et al.
Docketed:	October 21, 2014
Lower Ct:	Court of Appeal of California, Second Appellate District
Case Nos.:	(B239361)
Decision Date:	April 7, 2014
Discretionary Court	
Decision Date:	July 23, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Oct 21 2014	Petition for a writ of certiorari filed. (Response due November 20, 2014)
Nov 14 2014	Waiver of right of respondents Amy Imburgia, et al. to respond filed.
Nov 25 2014	DISTRIBUTED for Conference of December 12, 2014.
Nov 25 2014	Response Requested . (Due December 29, 2014)
Dec 15 2014	Order extending time to file response to petition to and including January 28, 2014, for all respondents.
Jan 28 2015	Brief of respondents Amy Imburgia, et al. in opposition filed.
Feb 10 2015	Reply of petitioner DIRECTV, Inc. filed.
Feb 11 2015	DISTRIBUTED for Conference of February 27, 2015.
Mar 2 2015	DISTRIBUTED for Conference of March 6, 2015.
Mar 9 2015	DISTRIBUTED for Conference of March 20, 2015.
Mar 23 2015	Petition GRANTED.
Apr 27 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Apr 30 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 29, 2015.
Apr 30 2015	The time to file respondents' brief on the merits is extended to and including July 17, 2015.
May 29 2015	Joint appendix filed.
May 29 2015	Brief of petitioner DIRECTV, Inc. filed.
Jun 1 2015	Brief amicus curiae of Pacific Legal Foundation filed.
Jun 2 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondents.
Jun 4 2015	Brief amicus curiae of DRI - The Voice of the Defense Bar filed.
Jun 5 2015	Brief amicus curiae of Washington Legal Foundation filed.
Jun 5 2015	Brief amicus curiae of Equal Employment Advisory Council filed.
Jun 5 2015	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.

Jun 5 2015	Brief amicus curiae of New England Legal Foundation filed.
Jun 5 2015	Brief amici curiae of Atlantic Legal Foundation and the International Association of Defense Counsel filed.
Jul 17 2015	The time to file respondent's brief on the merits is further extended to and including July 20, 2015.
Jul 20 2015	Brief of respondents Amy Imburgia, et al. filed.
Jul 23 2015	Brief amicus curiae of Michael Vachon filed. (Distributed)
Jul 24 2015	Brief amicus curiae of William R. Weinstein filed.
Jul 24 2015	Brief amici curiae of Arbitration and Contracts Scholars filed.
Jul 24 2015	Brief amicus curiae of Public Citizen, Inc. filed.
Jul 24 2015	Brief amici curiae of Law Professors Barbara Babcock, et al. filed.
Jul 24 2015	Brief amicus curiae of Professor Peter Linzer filed.
Jul 24 2015	Brief amici curiae of Law Professors filed.
Jul 24 2015	Brief amici curiae of California Law Professors filed.
Jul 29 2015	SET FOR ARGUMENT on Tuesday, October 6, 2015.
Jul 31 2015	CIRCULATED.
Aug 11 2015	Pursuant to Rule 29.6, a letter updating corporate disclosure statement was received from counsel for the petitioner DIRECTTV. (Distributed).
Aug 12 2015	Record requested from Court of Appeal of California, Second Appellate District.
Aug 13 2015	Reply of petitioner DIRECTV, Inc. filed. (Distributed)
Aug 26 2015	Supplemental brief of respondents Amy Imburgia, et al. filed. (Distributed)
Aug 31 2015	Supplemental response brief filed by petitioner DIRECTV, Inc. (Distributed)
Sep 17 2015	Record received from Court of Appeal of Ca. Second Appellate Dist. (1- Box)
Oct 6 2015	Argued. For petitioner: Christopher Landau, Washington, D. C. For respondents: Thomas C. Goldstein, Bethesda, Md.

14-462

Supreme Court, U.S.
FILED
OCT 21 2014
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second District

PETITION FOR WRIT OF CERTIORARI

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October 21, 2014

QUESTION PRESENTED

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner DIRECTV, Inc. has been merged into DIRECTV, LLC, with DIRECTV, LLC as the surviving entity. Pursuant to Supreme Court Rule 29.6, DIRECTV, LLC makes the following disclosures concerning parent entities and publicly held corporations that own 10% or more of its stock:

DIRECTV Holdings, LLC is the direct parent company and 100% owner of DIRECTV. LLC;

The DIRECTV Group, Inc. is the direct parent company and 100% owner of DIRECTV Holdings, LLC;

Greenlady Corp. controls a 57% interest in The DIRECTV Group, Inc.;

DTV Entertainment, Inc. is the direct parent company and 100% owner of Greenlady Corp.; and

DIRECTV, a publicly traded company and the ultimate parent company of DIRECTV, LLC, is the direct parent company and 100% owner of DTV Entertainment, Inc., and controls a 43% interest in The DIRECTV Group, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT ii

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

PERTINENT STATUTES AND RULES 4

STATEMENT OF THE CASE 5

A. Background 5

B. Proceedings Below 6

REASON FOR GRANTING THE WRIT 9

The California Court of Appeal Erred, And Created A Conflict With The Ninth Circuit, By Applying Preempted State Law To Invalidate An FAA-Governed Arbitration Agreement. 9

CONCLUSION 17

APPENDIX CONTENTS

Order of the California Supreme Court, July 23, 2014 ..... 1a

Opinion of the California Court of Appeal, April 7, 2014 ..... 2a

Opinion of the California Superior Court, County of Los Angeles, January 26, 2012 ..... 17a

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....13

American Express Co. v. Italian Colors Restaurant,
133 S. Ct. 2304 (2013) 12, 17

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 1-3, 7-8, 10-13, 15-16

Auto Equity Sales, Inc. v. Superior Ct.,
369 P.2d 937 (Cal. 1962).....9

Brown v. Investors Mortg. Co.,
121 F.3d 472 (9th Cir. 1997) (*per curiam*) 11

Brown v. Ralphs Grocery Co.,
128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011) 7

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....13

Cohen v. DIRECTV, Inc.,
48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006) 7

Discover Bank v. Superior Ct.,
113 P.3d 1100 (Cal. 2005).... 1-2, 7-8, 10-11, 13, 15-16

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996).....13

Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.,
661 F.2d 479 (5th Cir. 1981) 11

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,
458 U.S. 141 (1982).....11

Granite Rock Co. v. International Bhd. of Teamsters,
130 S. Ct. 2847 (2010) 13

Hauenstein v. Lynham,
100 U.S. 483 (1880).....11

In re DIRECTV Early Cancellation Fee Mktg. & Sales Pracs. Litig.,
810 F. Supp. 2d 1060 (C.D. Cal. 2011),
rev'd on other grounds sub nom. Lombardi v. DirecTV, Inc.,
546 F. App'x 715 (9th Cir. 2013) 13

In re H&R Block Refund Anticipation Loan Litig.,
__ F. Supp. 2d __, 2014 WL 3672124
(N.D. Ill. July 23, 2014) 14, 15, 16

In re Olshan Found. Repair Co.,
328 S.W.3d 883 (Tex. 2010).....12

KPMG LLP v. Cocchi,
132 S. Ct. 23 (2011) (*per curiam*) 13

Lafferty v. Wells Fargo Bank,
153 Cal. Rptr. 3d 240 (Cal. Ct. App. 2013).....9

Marmet Health Care Center, Inc. v. Brown,
132 S. Ct. 1201 (2012) (*per curiam*) 13

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 13

Meyer v. T-Mobile USA Inc.,
836 F. Supp. 2d 994 (N.D. Cal. 2011) 15

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....13, 14

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 14

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 2, 8-13, 16

Mutual Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 11, 12

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*) 17

Ostrowiecki v. Aggressor Fleet, Ltd.,
965 So.2d 527 (La. Ct. App. 2007) 12

Preston v. Ferrer,
552 U.S. 346 (2008) 13

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 17

Sarti v. Salt Creek Ltd.,
85 Cal. Rptr. 3d 506 (Cal. Ct. App. 2008) 9

Southland Corp. v. Keating,
465 U.S. 1 (1984) 10, 13, 17

Vaden v. Discover Bank,
556 U.S. 49 (2009) 17

Yee v. City of Escondido,
503 U.S. 519 (1992) 10

Statutes and Rules

28 U.S.C. § 1257(a) 4

9 U.S.C. § 2 ..... 4, 17

9 U.S.C. § 4 ..... 5, 14

U.S. Const. art. VI, cl. 2 ..... 4, 10

Other Authorities

Corbin, Arthur L.,
Corbin on Contracts (1962) 12

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available at
http://www.movietickets.com/privacy.asp#.U3ZdB50pDMo
(last accessed Oct. 20, 2014).....16

Time Warner Cable, Residential Services Subscriber Agreement,
at http://help.twcable.com/RSSA_English.pdf
(last accessed Oct. 20, 2014).....16

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available at http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions
(last accessed Oct. 20, 2014).....15

INTRODUCTION

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), this Court held that California's *Discover Bank* rule, which conditioned the enforceability of consumer arbitration agreements on the availability of classwide arbitration, was preempted by the Federal Arbitration Act ("FAA"). As the Court explained, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Because class arbitration "is not arbitration as envisioned by the FAA [and] lacks its benefits," it "may not be required by state law." *Id.* at 1752-53.

The California Court of Appeal's decision in this case does precisely what *Concepcion* prohibits: it applies state law to invalidate an arbitration agreement solely because that agreement includes a class-action waiver. The Court of Appeal purported to reconcile that result with *Concepcion* by holding that the parties here contractually opted out of FAA preemption, even though they specified that their arbitration agreement "shall be governed by the Federal Arbitration Act." Ironically, the Court based that holding on a "non-severability" clause designed to *prevent* class arbitration. Under that clause, the parties agreed that the arbitration agreement as a whole would be unenforceable if "the law of [the customer's] state" would find the class-action waiver unenforceable. The Court of Appeal seized on that clause to declare that the parties intended to rely on state law *preempted* by the FAA to avoid enforcement of an arbitration agreement *governed* by the FAA.

That reasoning, as the Ninth Circuit explained in interpreting the *same* language in the *same* arbitration agreement, is "nonsensical." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013). Under the Supremacy Clause, there is no such thing as state law immune from the preemptive force of federal law; to the extent that state law is preempted by federal law, it is a nullity. Thus, *Concepcion* made clear that "the *Discover Bank* rule [disallowing class-action waivers] is not, and indeed never was, California law." *Id.* Accordingly, the FAA requires enforcement of this arbitration provision.

The California Court of Appeal made no attempt to distinguish the Ninth Circuit's decision in *Murphy*; rather, it simply dismissed that decision as "unpersuasive." The upshot is the intolerable situation that parties in California can enforce their federal arbitration rights in federal court, but not in the state court across the street. And because the Court of Appeal's decision is binding on every state trial court in California, and "non-severability" clauses of the type at issue here are found in millions of individual consumer arbitration agreements in that State and elsewhere, the scope of the problem is truly monumental. This Court's review is warranted to resolve this manifest and acknowledged split of authority on a matter of federal law.

And, at an even more fundamental level, review is warranted to vindicate the supremacy of federal law and this Court's interpretation thereof. The FAA, as this Court has stated time and again, establishes a substantive federal policy in favor of arbitration, which requires both federal and state courts to enforce arbitration agreements according to their

terms and to resolve any doubts in *favor* of arbitration. The California Court of Appeal made a mockery of that federal policy, and this Court's recent decision in *Concepcion*, by refusing to enforce federal arbitration rights here on a theory that the Ninth Circuit has described as "nonsensical." The state court below transformed an agreement that *forbids* class arbitration into an agreement that *requires* class arbitration to be enforceable. By no stretch of the imagination can that decision be characterized as resolving any doubts in favor of arbitration; rather, that decision can only be described as a brazen attempt to defy *Concepcion* by resurrecting the preempted *Discover Bank* rule. Because the decision below not only creates an acknowledged conflict between state and federal courts on a matter of federal law, but also evinces the very hostility to arbitration that led to the enactment of the FAA in the first place, this Court's review is warranted.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 170 Cal. Rptr. 3d 190, and reprinted in the Appendix ("App.") at 2-16a. The unreported order of the California Supreme Court denying review of the Court of Appeal's decision is reprinted at App. 1a. The trial court's unreported opinion denying petitioner's motion to compel arbitration is reprinted at App. 17-20a.

JURISDICTION

The Court of Appeal issued its decision on April 7, 2014. App. 2a. Petitioner filed a timely petition for review, which the California Supreme Court denied

on July 23, 2014. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT STATUTES AND RULES

The Supremacy Clause of the U.S. Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 2 of the FAA provides in relevant part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any ... court ... for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the

> making of the agreement for arbitration ... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

STATEMENT OF THE CASE

A. Background

The provision and acceptance of DIRECTV programming services—like many other consumer services (*e.g.*, banking, cellular, internet)—are subject to certain basic terms and conditions. Those terms and conditions are set forth in the DIRECTV Customer Agreement. The Customer Agreement at issue here includes a dispute-resolution provision (Section 9) that specifies in relevant part:

> [I]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated ... and under the Rules set forth in this Agreement.
>
> * * *
>
> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration.

> If, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable.

In addition, the Customer Agreement contains a choice of law provision (Section 10(c)) that specifies as follows:

> Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

Finally, as relevant here, the Customer Agreement contains a general severability provision (Section 10(d)): "If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable."

B. Proceedings Below

In September 2008, respondents Amy Imburgia and Kathy Greiner filed separate putative class actions against DIRECTV, which were later consolidated, in Los Angeles Superior Court. App. 3a. Both complaints alleged that DIRECTV had violated a variety of California laws by assessing early cancellation fees when respondents cancelled

their DIRECTV accounts before the end of an agreed-upon time period. *Id.*

Although the parties had agreed to arbitrate disputes like this one, DIRECTV did not move to compel arbitration when the complaints were filed. That is because, in 2005, the California Supreme Court had announced a rule that invalidated almost all consumer arbitration agreements containing class-action waivers under California law. *See Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1106-10 (Cal. 2005). Applying the *Discover Bank* rule, California courts refused to enforce the arbitration provision in the DIRECTV Customer Agreement. *See, e.g., Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006). Accordingly, any attempt to compel arbitration when the complaints in this case were filed would have been futile under then-prevailing California law. The case therefore proceeded in court until, on April 27, 2011, this Court held in *Concepcion* that the FAA preempts the *Discover Bank* rule. *See* 131 S. Ct. at 1747-48.

In light of *Concepcion*, DIRECTV promptly moved to compel arbitration. The Superior Court (Wiley, J.), however, denied the motion on the ground that the parties' arbitration agreement is unenforceable under *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), a case involving labor-related representative actions under California's Private Attorney General Act of 2004. App. 17-20a.

DIRECTV appealed, but the Court of Appeal affirmed the trial court's decision on different grounds. *See* App. 2-16a. In particular, the Court of Appeal focused on the arbitration agreement's non-severability provision, which states that "if 'the law

of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.'" App. 6a (quoting Customer Agreement § 9). According to the Court, the reference to "the law of your state" in this provision means state law immune from the preemptive force of federal law. App. 6-15a. Thus, the Court concluded, the non-severability clause requires the application of the *Discover Bank* rule to nullify the parties' arbitration provision, even though that rule is concededly inconsistent with, and thus preempted by, the FAA under *Concepcion*, and even though the arbitration agreement here is concededly governed by the FAA. App. 15a.

The Court of Appeal acknowledged that its decision conflicts with the Ninth Circuit's decision in *Murphy*, which had characterized the reasoning adopted by the Court of Appeal as "nonsensical." *Murphy*, 724 F.3d at 1226. The Court of Appeal, in turn, dismissed the Ninth Circuit's analysis as "unpersuasive." App. 13a. According to the Court of Appeal, "*Murphy* provides no basis for concluding that the parties intended to use the phrase 'the law of your state'" to mean state law subject to the preemptive force of federal law. *Id.* Instead, the Court of Appeal interpreted the phrase "the law of your state" to mean "'the (nonfederal) law of your state *without considering the preemptive effect, if any, of the FAA.*'" *Id.* at 14a (emphasis added). Applying the preempted *Discover Bank* rule, the Court held the class-action waiver invalid, and thus refused to enforce the entire arbitration agreement. App. 15a.

DIRECTV timely petitioned for review in the California Supreme Court to resolve the conflict between the California Court of Appeal and the Ninth Circuit on this question of federal law. On July 23, 2014, however, the California Supreme Court denied review over Justice Baxter's dissent. App. 1a. This petition follows.

REASON FOR GRANTING THE WRIT

The California Court of Appeal Erred, And Created A Conflict With The Ninth Circuit, By Applying Preempted State Law To Invalidate An FAA-Governed Arbitration Agreement.

This petition presents a conflict about as stark as they come: the California Court of Appeal and the Ninth Circuit interpreted the *same* language in the *same* FAA-governed arbitration agreement, and came to diametrically opposite results. The Ninth Circuit in *Murphy* characterized the position adopted by the California Court of Appeal as "nonsensical," 724 F.3d at 1226, while the Court of Appeal dismissed the Ninth Circuit's position as "unpersuasive," App. 13a. The Ninth Circuit thus enforced the arbitration provision at issue, while the Court of Appeal refused to do so. Under settled California law, the Court of Appeal's decision in this case is binding on *every* trial court in that State. *See Auto Equity Sales, Inc. v. Superior Ct.*, 369 P.2d 937, 940 (Cal. 1962) ("Decisions of every division of the District Courts of Appeal are binding upon all the ... superior courts of this state."); *see also Lafferty v. Wells Fargo Bank*, 153 Cal. Rptr. 3d 240, 257 (Cal. Ct. App. 2013) (same); *Sarti v. Salt Creek Ltd.*, 85 Cal. Rptr. 3d 506, 510 (Cal. Ct. App. 2008) (same).

Thus, the enforcement of federally protected arbitration rights in California now turns on whether a dispute is litigated in state or federal court. This Court should not tolerate this anomalous and untenable situation, which "encourage[s] and reward[s] forum-shopping" antithetical to the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). These forum-shopping concerns present "a substantial reason for granting certiorari," particularly where, as here, "the conflict is between two courts whose jurisdiction includes California, the State with the largest population ...." *Yee v. City of Escondido*, 503 U.S. 519, 537-38 (1992).

If the conflict goes unresolved, California trial courts will be required to continue applying a rule that is fundamentally inconsistent with, and thus preempted by, the FAA. *See Concepcion*, 131 S. Ct. at 1748. According to the Court of Appeal, the non-severability provision in DIRECTV's Customer Agreement, which sought to *avoid* class arbitration under the *Discover Bank* rule, evinces an intent to *preserve* the *Discover Bank* rule. In particular, the Court held, the agreement's reference to "the law of your state" means *hypothetical* state law immune from the preemptive force of federal law, rather than *actual* state law subject to the preemptive force of federal law. App. 8-15a. That conclusion cannot withstand scrutiny for at least three reasons.

First, as the Ninth Circuit explained in *Murphy*, there is no such thing as state law immune from the preemptive force of federal law. *See* 724 F.3d at 1226. Under the Supremacy Clause of the Federal Constitution, U.S. Const. art. VI, cl. 2, state law is always subject to the preemptive force of federal law,

and, to the extent preempted, is "nullified," *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). The preempted state law does not live on in the shadows, only to emerge when unsuspecting parties invoke the "law of [a] state" in their private dealings. Rather, "it has long been settled that state laws that conflict with federal law are *without effect*." *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (emphasis added; internal quotation omitted).

Thus, in light of *Concepcion*, "the *Discover Bank* rule is not, and indeed never was, California law." *Murphy*, 724 F.3d at 1226. Rather, "the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, *is* the law of California and of every other state." *Id.* (emphasis in original); *see also id.* (""[A] fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'") (quoting *De la Cuesta*, 458 U.S. at 157) (in turn quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)); *see also Brown v. Investors Mortg. Co.*, 121 F.3d 472, 476 (9th Cir. 1997) (*per curiam*) (reference to state law in contract "does not mean the parties decided that federal law should not apply"); *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 482-83 (5th Cir. 1981) (reference to state law in contract does "not mean that all rights and obligations created by [federal law] are superseded by [state] law" because "[a] choice of law provision ... merely designates the state whose law is to be applied to the extent its use is not preempted by nor contrary to the policies of [federal law]"); *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 890 (Tex.

2010) ("[J]ust as the FAA is part of the substantive law of Texas, the FAA would be part of the arbitration laws in Texas," and thus "[t]he language of the arbitration clause designating arbitration pursuant to 'the arbitration laws in your state' includes the FAA"); *Ostrowiecki v. Aggressor Fleet, Ltd.*, 965 So.2d 527, 536 (La. Ct. App. 2007) (reference to state law in contract does not avoid federal preemption because "it is axiomatic that the law of any state includes federal law"); *see also* 6A Arthur L. Corbin, *Corbin on Contracts* § 1374 at 7 (1962) ("Under our Constitution, national law is also the law of every separate State."). It is thus fanciful to interpret a reference to "the law of your state" to mean state law that is "without effect," *Bartlett*, 133 S. Ct. at 2473—which, after all, is not "law" at all.

Second, the agreement at issue here *specifically provides* that, "[n]otwithstanding" the general choice-of-law provision in the Customer Agreement, the arbitration clause "'shall be governed by the Federal Arbitration Act.'" App. 5a (quoting Customer Agreement § 10(b)). Given the parties' explicit expectation that the FAA would govern their arbitration agreement, "it would be remarkable for a court to erase that expectation" by relying on state law inconsistent with, and thus preempted by, the FAA. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013). As the Ninth Circuit recognized in *Murphy*, the non-severability provision represents an agreement to *prevent* the application of state law inconsistent with the FAA, "not an agreement to *rely* on state law that 'creates a scheme inconsistent with the FAA.'" 724 F.3d at 1226 (emphasis added; quoting *Concepcion*, 131 S. Ct. at 1748); *see also In re DIRECTV Early*

Cancellation Fee Mktg. & Sales Pracs. Litig., 810 F. Supp. 2d 1060, 1071 (C.D. Cal. 2011) (holding that to apply preempted state law to the DIRECTV arbitration agreement would render the FAA choice-of-law provision "meaningless" and that "the language of the Arbitration Clause is clear that the parties intended for federal law to apply"), *rev'd on other grounds sub nom. Lombardi v. DirecTV, Inc.*, 546 F. App'x 715 (9th Cir. 2013). Far from embracing the *Discover Bank* rule, the parties here "did exactly the opposite" by agreeing to a class-action waiver. *Murphy*, 724 F.3d at 1228. Because the parties' arbitration agreement is, by its express terms, "governed by the Federal Arbitration Act," the California Court of Appeal's refusal to enforce that agreement based on state law preempted by the FAA can only be described as perverse.

And *third*, even if there were any doubts as to any of the foregoing, the decision below cannot possibly be characterized as a faithful application of the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (*per curiam*); *Concepcion*, 131 S. Ct. at 1749; *Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2856-57 (2010); *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-45 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Southland*, 465 U.S. at 10-16;

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Under that policy, as a matter of substantive federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mitsubishi*, 473 U.S. at 626 (noting that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability").

By refusing to compel arbitration "in accordance with the terms of the agreement," 9 U.S.C. § 4, the California Court of Appeal plainly violated the FAA. Indeed, although the arbitration agreement at issue here specifies that it is "governed by the Federal Arbitration Act," the Court did not even acknowledge the "emphatic federal policy" in favor of arbitration. *Mitsubishi Motors*, 473 U.S. at 631; *see also In re H&R Block Refund Anticipation Loan Litig.*, __ F. Supp. 2d __, 2014 WL 3672124, at *5 (N.D. Ill. July 23, 2014) (rejecting the decision below and noting that "the *Imburgia* court failed to take account of the liberal federal policy favoring arbitration").

And the conflict between the California Court of Appeal and the Ninth Circuit affects a wide range of arbitration agreements entered into by millions of individual customers and companies in California and elsewhere. Many arbitration agreements, like the one at issue here, include references to state law. If such references are deemed to refer to state law preempted by the FAA, then the FAA's preemptive

effect is essentially nullified. Thus, customers of T-Mobile USA sought to avoid arbitration by making the same argument as respondents here: that the preempted *Discover Bank* rule continues to apply after *Concepcion* because "T-Mobile voluntarily and privately agreed to limit the application of the Agreement's terms, including the arbitration clause, if any of the terms were invalid under the law of a particular jurisdiction." *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 1001 (N.D. Cal. 2011) (Breyer, J.); *see generally* T-Mobile Terms & Conditions, *available at* http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions (last accessed Oct. 20, 2014) (T-Mobile arbitration agreement specifying that "[i]f any provision of the Agreement is invalid under the law of a particular jurisdiction, that provision will not apply in that jurisdiction" and including class-action waiver and non-severability provision). The court, however, squarely rejected that argument, noting that (as here) "the arbitration agreement is not governed *only* by California law," but also by the FAA, and "the FAA preempts the *Discover Bank* rule" per *Concepcion*. *Meyer*, 836 F. Supp. 2d at 1001 (emphasis in original).

Similarly, customers of H&R Block sought to avoid arbitration after *Concepcion* by "argu[ing] that the arbitration clause does not apply to their claims because they reside in states that prohibit class-action waivers in consumer arbitration agreements." *H&R Block*, 2014 WL 3672124, at *3; *see generally id.* at *2 (H&R Block loan agreement providing that "IF YOU APPLY FOR [a loan] IN A STATE THAT PROHIBITS ARBITRATION OR CLASS ACTION WAIVERS FOR CLAIMS RELATED TO [such a

loan] ... THIS [arbitration agreement] SHALL NOT APPLY TO THOSE CLAIMS."). Again, the court readily rejected that argument, relying on the Ninth Circuit's decision in *Murphy* and rejecting the California Court of Appeal's decision in this case. *See id.* at *3-5.

And these references to state law in arbitration agreements are hardly idiosyncratic. *See, e.g.*, MovieTickets.com® Privacy Statement, *available at* http://www.movietickets.com/privacy.asp#.U3ZdB50pDMo (last accessed Oct. 20, 2014) (agreeing to arbitrate disputes on an individual basis only, but providing that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire paragraph (Class Action Waiver) is unenforceable"); Time Warner Cable, Residential Services Subscriber Agreement, *available at* http://help.twcable.com/RSSA_English.pdf (last accessed Oct. 20, 2014) (agreement specifying that if a "legal requirement[] that appl[ies] where you live or where we provide Services to you ... conflicts with our Customer Agreements with respect to one or more Services, the legal requirement will take priority over the part of our Customer Agreements with which it conflicts," and containing arbitration provision with class-action waiver and non-severability provision).

At bottom, the California Court of Appeal flouted federal law by refusing to enforce the FAA-governed arbitration agreement in this case and resurrecting the *Discover Bank* rule buried in *Concepcion*. This Court should not countenance such insubordination. As this Court has explained, "[t]he 'body of federal

substantive law' generated by elaboration of FAA § 2 is equally binding on state and federal courts." *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (quoting *Southland*, 465 U.S. at 12). Indeed, "[g]iven the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Id.*; *see also Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (*per curiam*). Because the California state courts have abdicated that role, enforcement of federal arbitration rights in that State now depends on whether a dispute is litigated in state or federal court.

Allowing the acknowledged conflict between the California Court of Appeal and the Ninth Circuit to fester would not only promote legal uncertainty and forum-shopping, but would undermine the whole purpose of arbitration in the first place: to promote speedy and efficient resolution of disputes. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2312; *Southland*, 465 U.S. at 7. An arbitration agreement is effectively worthless if it will be enforced in some courts but not in others. Accordingly, this Court should grant this petition to vindicate the FAA's "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX CONTENTS

Order of the California Supreme Court,
July 23, 2014 ..... 1a

Opinion of the California Court of Appeal,
April 7, 2014 ..... 2a

Opinion of the California Superior Court,
County of Los Angeles,
January 26, 2012 ..... 17a

Court of Appeal, Second Appellate District,
Division One - No. B239361

S218686

IN THE SUPREME COURT OF CALIFORNIA

En Banc

AMY IMBURGIA et al.,

Plaintiffs and Respondents,

v.

DIRECTV, INC.,

Defendant and Appellant.

The application to appear as counsel pro hac vice is granted. The petition for review is denied.

Baxter, J., is of the opinion the petition should be granted.

CANTIL-SAKAUYE
Chief Justice

SUPREME COURT
FILED
JUL 23 2014
Frank A. McGuire Clerk
Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

AMY IMBURGIA et al.,

Plaintiffs and Respondents,

v.

DIRECTV, INC.,

Defendant and Appellant.

B239361

(Los Angeles County Super. Ct. No. BC398295)
Court of Appeal - Second Dist.

FILED
APR 7 2014
Joseph A. Lane Clerk

APPEAL from an order of the Superior Court of Los Angeles County. John Shepard Wiley, Jr., Judge. Affirmed.

Kirkland & Ellis LLP, Melissa D. Ingalls, Robyn E. Bladow, and Shaun Paisley for Defendant and Appellant.

Milstein Adelman LLP, Paul D. Stevens, Mayo L. Makarczyk, and Shireen Mohsenzadegan; Consumer Watchdog, Harvey Rosenfield, and Pamela Pressley; The Evans Law Firm and Ingrid Maria Evans; Law Offices of F. Edie Mermelstein and F Edie Mermelstein for Plaintiffs and Respondents.

DIRECTV, Inc. moved to dismiss or stay this class action litigation and to compel arbitration. The superior court denied the motion. DIRECTV argues that the motion should have been granted under the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740] *(Concepcion)*. We conclude that under the terms of the parties' arbitration agreement, the motion was correctly denied. We therefore affirm.

BACKGROUND

On September 17, 2008, Amy Imburgia filed a class action complaint against DIRECTV. alleging claims for unjust enrichment, declaratory relief, false advertising, and violation of the Consumer Legal Remedies Act (CLRA) (Civ. Code,. § 1750 et seq.), the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.), and Civil Code section 1671, subdivision (d). Imburgia's claims were based on allegations that DIRECTV has improperly charged early termination fees to its customers. Kathy Greiner filed a similar class action complaint one day after Imburgia, and Imburgia and Greiner (hereafter plaintiffs) jointly filed a first amended complaint on March 16, 2009. Plaintiffs' lawsuit proceeded at the same time as a multidistrict litigation proceeding in federal court involving similar claims. DIRECTV moved to stay plaintiffs' state court action pending the outcome of the multidistrict litigation, but the superior court denied the motion.

Plaintiffs subsequently moved for class certification. On April 20, 2011, the superior court granted the motion in part and denied it in part,

certifying a class as to one of plaintiffs' theories but denying certification as to others.

On April 27, 2011, the United States Supreme Court decided *Concepcion,* which held that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) preempts the rule of *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 *(Discover Bank). Discover Bank* held that under certain circumstances, class action waivers in consumer contracts are unconscionable and hence unenforceable. *(Id.* at pp. 162-163.)

On May 17, 2011, less than one month after the Court decided *Concepcion,* DIRECTV moved to stay or dismiss plaintiffs' action, decertify the class, and compel arbitration of plaintiffs' claims. DIRECTV explained that it had not moved to compel arbitration earlier because, in an unrelated case several years before plaintiffs filed this litigation, the Court of Appeal had held that the arbitration provision in DIRECTV's customer agreement was unenforceable under *Discover Bank.* (See *Cohen* v. *DIRECTV, Inc.* (2006) 142 Cal.App.4th 1442, 1455.) Until *Concepcion* held that the FAA preempts the rule of *Discover Bank,* DIRECTV consequently believed that a motion to compel arbitration would be futile.

The relevant arbitration provision is contained in section 9 of DIRECTV's 2007 customer agreement. Section 9 provides that "any legal or equitable claim relating to this Agreement, any addendum, or your Service" will first be addressed through an informal process and, if the claim is not resolved informally, then "any Claim either of us asserts will be resolved only by binding arbitration" under JAMS rules.

Under the heading "Special Rules," section 9 of the agreement provides as follows: "Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable."

Section 10 of the 2007 customer agreement contains provisions addressing several miscellaneous matters, including the following provision concerning "Applicable Law": "The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act."

Plaintiffs opposed the motion to compel arbitration on numerous grounds. The superior court denied the motion, and DIRECTV timely appealed.

STANDARD OF REVIEW

"On appeal from the denial of a motion to compel arbitration, 'we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law. [Citations.]' (*Kleveland v. Chicago Title Ins. Co.*

(2006) 141 Cal.App,4th 761, 764.)" (*Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 892.) We review the superior court's ruling, not its reasoning, and we consequently may affirm on the basis of any valid legal theory, regardless of whether the superior court relied on it. (See, e.g., *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 663-664.)

DISCUSSION

In addition to stating that the parties waive their rights to bring class claims, section 9 of the 2007 customer agreement states that if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." Plaintiffs argue that the law of California would find the class action waiver unenforceable because, for example, the CLRA expressly precludes waiver of the right to bring a class action under the CLRA. (Civ. Code, §§ 1751, 1781, subd. (a).) Plaintiffs conclude that the parties' entire arbitration agreement is unenforceable, pursuant to the agreement's express terms, because the law of plaintiffs' state would find the class action waiver unenforceable. We agree.

As all parties point out, the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 478 (*Volt*).) The FAA's broad policy of enforcement of arbitration agreements according to their terms applies even to "agreements to arbitrate under different rules than those set forth in the [FAA] itself." (*Id.* at p. 479.) Thus, if "parties have agreed to abide by state rules

of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA," even if application of the state rules would yield a different result from application of the FAA. (*Ibid.*; see also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1352-1353 (*Cable Connection*); *Best Interiors, Inc. v. Millie & Severson, Inc.* (2008) 161 Cal.App.4th 1320, 1326 ["even if the FAA applies because the [contract] affects interstate commerce ... the parties may agree that California law governs their agreement to arbitrate"].) Consequently, although it is impossible for parties to "'opt out' of FAA coverage in its entirety because it is the FAA itself that authorizes parties to choose different rules in the first place," it is in other respects permissible for the parties to "opt out of the FAA's default rules." (*Ario v. The Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account* (3d Cir. 2010) 618 F.3d 277, 288 (*Ario*).) In particular, a choice of law provision in an arbitration agreement is, in general, enforceable to the same extent as a choice of law provision in any other contract. (See generally *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 464-466 [articulating the standard for enforcement of contractual choice of law provisions under California law].) We have previously held that the parties to a contract may choose the law under which the enforceability of a class action waiver is to be determined. (*Discover Bank v. Superior Court* (2005) 134 Cal.App.4th 886, 889.)

Under the foregoing principles, if section 9 of DIRECTV's 2007 customer agreement had said that the enforceability of the class action waiver "shall be determined under the law of your state to the extent

that it is not preempted by the FAA," then that provision would have been enforceable. Likewise, if section 9 had said that the enforceability of the class action waiver "shall be determined under the law of your state without considering the preemptive effect, if any, of the FAA," then that provision would have been enforceable as well. No party argues to the contrary.[1]

Section 9 of the 2007 customer agreement is not, however, as explicit as either of those hypothetical examples. The question before us, then, is how to interpret section 9's choice of law concerning enforceability of the class action waiver. Where section 9 requires us to consider whether "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable," does it mean "the law of your state to the extent it is not preempted by the FAA," or "the law of your state without considering the preemptive effect, if any, of the FAA"? Plaintiffs argue that it means the latter, and we agree.

Plaintiffs' principal argument in favor of their interpretation is that "under well established principles of contract interpretation, when a general

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[1] We note that *Concepcion* did not hold that the FAA prohibits class arbitration. Rather, the case held that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*Concepcion, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1751].) Parties thus remain free to agree to class arbitration, even under the FAA as interpreted by *Concepcion*. But if the FAA does not prohibit parties from agreeing to class arbitration itself, then the FAA presumably does not prohibit them from agreeing that their agreement will be governed by state laws that are less hostile to class arbitration than the FAA.

and a particular provision are inconsistent, the particular and specific provision is para[]mount to the general provision." (*Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235.) On that basis, plaintiffs contend that the reference to "the law of your state" in section 9 of the 2007 customer agreement operates as "a specific *exception* to the arbitration agreement's *general* adoption of the FAA" in section 10. That is, although the agreement provides that in general section 9 is governed by the FAA, section 9 itself provides that the specific issue of the enforceability of the class action waiver shall be governed by "the law of your state."

DIRECTV's sole response to that argument is that "the contract interpretation principle [p]laintiffs invoke applies only where 'the provisions in question are truly inconsistent,'" but "there is no inconsistency" here because "both federal *and* state law have a role." (Internal quotation marks omitted.) We are not persuaded. If we apply state law alone (for example, the antiwaiver provision of the CLRA) to the class action waiver, then the waiver is unenforceable. If we apply federal law, then the class action waiver is enforceable and any state law to the contrary is preempted. That is a sufficient inconsistency to make plaintiffs' principle of contract interpretation applicable. Indeed, the entire preemption analysis of *Concepcion* is based on a conflict or inconsistency between the *Discover Bank* rule and the FAA. (See *Concepcion, supra,* 563 U.S. at p. __ [131 S.Ct. at p. 1751] ["class arbitration, to the extent it is manufactured by *Discover Bank* ... is inconsistent with the FAA"]; *id.* at pp. 1749-1750 ["the FAA was designed to promote arbitration," and "California's *Discover Bank* rule ... interferes with

arbitration"]; *id.* at p. 1753 ["California's *Discover Bank* rule is preempted by the FAA" because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (internal quotation marks omitted)].)[2]

Our interpretation of the contract finds further support in "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." (*Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 62.) DIRECTV

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[2] We also note that another provision of section 9 of the 2007 customer agreement appears to reflect the parties' intention to opt out of the FAA in certain respects, notwithstanding section 10's general statement that section 9 is governed by the FAA. Section 9 provides that "the arbitrator has no authority to make errors of law, and any award may be challenged if the arbitrator does so." The effect of such a provision is to authorize judicial review of arbitration awards for errors of law. But in *Hall Street Associates, L.L.C. v. Mattel, Inc.* (2008) 552 U.S. 576, the United States Supreme Court held that FAA procedures do not allow judicial review for errors of law, and parties cannot by agreement expand the scope of review under those procedures; the Court expressly declined to hold, however, that the FAA bars state laws from allowing for broader review. (See *id.* at pp. 586-590; see also *Concepcion, supra*, 563 U.S. at p. __ [131 S.Ct. at p. 1752] ["parties may not contractually expand the grounds or nature of judicial review' under the FAA].) (Under California law, broader judicial review is available by agreement of the parties. (*Cable Connection, supra*, 44 Cal.4th at pp. 1339-1340.)) The United States Supreme Court did not decide that issue until 2008, however, so its bearing on the 2007 customer agreement is not entirely clear. But the record reflects that DIRECTV's 2009 customer agreement contains the same authorization of judicial review for errors of law, which evidences DIRECTV's intention to opt out of the FAA in at least that respect even though the arbitration provision is in general governed by the FAA.

"drafted an ambiguous document, and [it] cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *(Id.* at p. 63.) Moreover, "[t]hat rationale is well suited to the facts of this case" because "[a]s a practical matter, it seems unlikely that" plaintiffs anticipated in 2007 that the Supreme Court would hold in 2011 that the FAA preempts the *Discover Bank* rule concerning the enforceability of class action waivers in arbitration agreements. *(Ibid.)* "In the face of such doubt, we are unwilling to impute this intent to [plaintiffs]." *(Ibid.)*

Finally, DIRECTV cites three cases as having "rejected" plaintiffs' argument. Two of the cases are readily distinguishable because, unlike the instant case, neither of them involves an arbitration agreement that specifically provides that the enforceability of the class action waiver is to be decided under state law. (See *Litman* v. *Cellco Partnership* (3d Cir. 2011) 655 F.3d 225, 231, fn. 8 [the agreement provided that state law applied "[e]xcept to the extent we've agreed otherwise in the provision[] on ... arbitration," the arbitration provision stated that it was governed by the FAA, and the class action waiver stated that "if for some reason the prohibition on class arbitrations ... is deemed unenforceable, then the agreement to arbitrate will not apply"]; *Meyer v. T-Mobile USA, Inc.* (N.D.Cal. 2011) 836 F.Supp.2d 994, 1001 [the agreement's only choice of law provision stated: "This Agreement is governed by the Federal Arbitration Act, applicable federal law, and the laws of the state in which your billing address in our records is located"].)

The third case, however, is a decision in the federal multidistrict litigation that parallels the instant state court actions. In an "[i]ndicative [r]uling" under rule 62.1 of the Federal Rules of Civil Procedure, the federal district court stated that the reference to "the law of your state" in section 9 of the customer agreement could not mean that enforceability of the class action waiver should be determined exclusively under state law, because that would render "meaningless" section 10's general statement that the arbitration agreement is governed by the FAA. (*In re DIRECTV Early Cancellation Fee Marketing and Sales Practices Litigation* (C.D.Cal. 2011) 810 F.Supp.2d 1060, 1071.) We disagree. The specific reference to state law concerning the enforceability of the class action waiver creates a narrow and specific exception to the general provision that the arbitration agreement will be governed by the FAA. It does not render that general provision meaningless. In addition, the district court's analysis does not address the principles that a specific provision controls over a general one and that ambiguous language is construed against the interest of the drafter. For all of these reasons, we decline to follow the district court's decision.

After briefing in this appeal was completed, the United States Court of Appeals for the Ninth Circuit decided a similar case concerning the enforceability of the arbitration provision and class action waiver in DIRECTV's customer agreement under *Concepcion*. (See *Murphy v. DIRECTV, Inc.* (9th Cir. 2013) 724 F.3d 1218 (*Murphy*).) The court held that "the arbitration agreement is enforceable under *Concepcion*," which preempts any state law to the

contrary.(*Id.* at p. 1228.) The court reasoned that "the parties' various contract interpretation arguments"—which included both the argument that the specific reference to state law controlled over the general reference to the FAA and the argument that ambiguities should be construed against the drafter—"are largely irrelevant to our analysis," because under the Supremacy Clause of the United States Constitution, and the related doctrine of federal preemption, federal law *is* the law of every state. (*Ibid.*; see also *id.* at p. 1226 ["Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, *is* the law of California and of every other state"]; see generally *id.* at pp. 1225-1228.)

We find the analysis in *Murphy* unpersuasive. On the one hand, insofar as the court's reasoning is a matter of contract interpretation, it means that when the parties used the phrase "the law of your state," they meant "federal law plus (nonfederal) state law." *Murphy* provides no basis for concluding that the parties intended to use the phrase "the law of your state" in such a way, and we are aware of none. On the contrary, a reasonable reader of the customer agreement would naturally interpret the phrase "the law of your state" as referring to (nonfederal) state law, and any ambiguity should be construed against the drafter.[3] On the other hand, insofar as the court reasoned that contract interpretation is irrelevant

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[3] We here insert the parenthetical qualification "nonfederal" only to avoid confusion because *Murphy* states that federal law is state law. (*Murphy, supra*, 724 F.3d at p. 1226.) Elsewhere in this opinion, when we have referred to state law, we likewise meant nonfederal state law.

because the parties are powerless to opt out of the FAA by contract, we are aware of no authority for the court's position. Rather, as we have already observed, if the customer agreement expressly provided that the enforceability of the class action waiver "shall be determined under the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA," then that choice of law would be enforceable; *Murphy* cites no authority to the contrary.[4] Consequently, the dispositive issue is

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[4] For example, *Murphy* cites a Third Circuit case for the proposition that, because of the Supremacy Clause, "choice-of-law doctrines (and, accordingly, attempts by contracting parties to influence their application with choice-of-law clauses) have no applicability to answering" the question of whether federal law or (nonfederal) state law supplies the rule of decision. (*Roadway Package System, Inc. v. Kayser* (3d Cir. 2001) 257 F.3d 287, 293-294, abrogated on other grounds in *Hall Street Associates, L.L.C. v. Mattel, Inc., supra*, 552 U.S. at p. 576; see *Murphy, supra*, 724 F.3d at p. 1228.) But that Third Circuit case actually held that, *pursuant to the FAA itself*, parties *are* generally free to "'specify by contract the rules under which ... arbitration will be conducted,'" even if the parties choose (nonfederal) state law rules that are inconsistent with the federal rules that would otherwise be applicable. (*Roadway Package System, Inc. v. Kayser, supra*, 257 F.3d at p. 294, quoting *Volt, supra*, 489 U.S. at p. 479.) That is the rule on which we rely, and which the Third Circuit recently reaffirmed in *Ario, supra*, 618 F.3d at p. 288. Similarly, *Murphy* relies on the dissenting opinion in *Volt* (see *Murphy, supra*, 724 F.3d at p. 1227), but that opinion too expressly agreed that parties may choose "state arbitration rules" instead of federal ones. (*Volt, supra*, 489 U.S. at p. 481, fn. 4 (Brennan, J., dissenting) ["I do not disagree with the Court's holding ... that the FAA does not pre[]empt state arbitration rules, even as applied to contracts involving interstate commerce, when the parties have agreed to arbitrate by those rules to the exclusion of federal arbitration law"].)

whether the parties intended to make that choice. As a result, "the parties' various contract interpretation arguments" are not "largely irrelevant." (*Murphy, supra*, 724 F.3d at p. 1228.)

To summarize: Section 9 of the 2007 customer agreement provides that "if ... the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." The class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable. The superior court therefore properly denied the motion to compel arbitration.[5]

DISPOSITION

The order is affirmed. Respondents shall recover their costs of appeal.

CERTIFIED FOR PUBLICATION.

ROTHSCHILD, Acting P. J.

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[5] DIRECTV argues that if the class action waiver is unenforceable as to plaintiffs' CLRA claims, then, at most, the arbitration agreement would be unenforceable as to those claims, and the motion to compel arbitration should have been granted as to the remainder of plaintiffs' claims. We disagree. The language of the relevant provision of section 9 is broad, stating that "this entire Section 9 is unenforceable" if the class action waiver is unenforceable. Nothing in the language of the agreement suggests that the parties intended that if some class claims had to be litigated in court, then the parties would still arbitrate any claims as to which the class action waiver was enforecable. On the contrary, the language of the agreement indicates that if the class action waiver is unenforceable, then the parties are not interested in arbitrating at all. Again, insofar as the language of the agreement is ambiguous, we must construe it against the drafter. (*Mastrobuono v. Shearson Lehman Hutton, Inc., supra*, 514 U.S. at pp. 62-63.)

We concur:

CHANEY, J.

MILLER, J.*

Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Superior Court of California, County of Los Angeles

DATE: 01/26/12			DEPT. 311
HONORABLE JOHN SHEPARD WILEY JR	JUDGE	M. MATA	DEPUTY CLERK
		ELECTRONIC RECORDING MONITOR	
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T. BIVINS, CA	Deputy Sheriff	L. COMSTOCK (CSR 3741)	Reporter

8:30 am	BC398295 AMY IBURGIA ET AL VS DIRECTV INC 170.6 CCP AGAINST JUDGE LICHTMA C/W BC398431 DEEMED COMPLEX (09-29-08)	Plaintiff Counsel	PAUL D. STEVENS (X) SHIREEN MOHSENZADEGAN (X) EDIE MERMELSTEIN (X) MARK MILSTEIN (X)
		Defendant Counsel	ROBYN E. BLADOW (X) SHAUN PAISLEY (X) MELISSA D. INGALLS (X)

NATURE OF PROCEEDINGS:

MOTION TO DISMISS/STAY;

MOTION TO COMPEL ARBITRATION;

Matters are called for hearing.

Counsel have read a copy of the Court's tentative ruling, given to counsel before the hearing.

Matters are argued. The Court's tentative ruling stands as follows:

Motion denied because Brown controls.

Plaintiffs Amy Imburgia and Kathy Greiner initiated this class action against Defendant DirecTV. Inc. For convenience, the court refers to both Plaintiffs as "Imburgia." Imburgia contends DirecTV unlawfully charged early cancellation fees to customers who terminated DirecTV's service

before their contracts expired. The court certified a class of "[a]11 California DirecTV customers who were charged by and/or paid to [DirecTV] an [early cancellation fee] from September 17, 2004 to the present."

The service contract DirecTV sends its customers contains an arbitration clause. At the time Imburgia filed the complaint in this case, Discover Bank was controlling authority. In Discover Bank, the California Supreme Court invalidated consumer arbitration agreements with class action waivers. (Discover Bank v. Superior Court (2005) 36 Cal.4th 148, 162-163.) The arbitration agreement in DirecTV's service contract contains a class action waiver. DirecTV did not move to compel arbitration when it responded to Imburgia's complaint, because its arbitration agreement was invalid under Discover Bank. Then, on April 27, 2011, the United States Supreme Court invalidated Discover Bank. In AT&T Mobility, the court held agreements to arbitrate cannot be invalidated by defenses that derive their meaning from the fact that an agreement to arbitrate is at issue. (AT&T Mobility LLC v. Concepcion (2011) 131 S.Ct. 1740, 1742-1743.)

Based on AT&T Mobility, DirecTV moves to compel arbitration. The motion is denied. Imburgia argues the arbitration agreement is unconscionable because it waives the statutory right to bring classwide arbitration or a class action lawsuit under the Consumers Legal Remedies Act ("CLRA"). Civil Code section 1781 provides, "[a]ny consumer entitled to bring an action under [the CLRA] may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an

action on behalf of himself and such other consumers to recover damages or obtain other relief." (Civ. Code, § 1781, subd. (a).) Under state law, the provisions of the CLRA are nonwaivable. (Civ. Code, § 1751.)

In the Brown case, California Court of Appeal noted the AT&T Mobility decision did not reach the issue of whether the Federal Arbitration Act preempts California law on waivers of statutory representative actions. (Brown v. Ralphs Grocery Co. (2011) 197 Cal.App.4th 489, 502.) Thus, the court held a waiver of the right to bring a representative action under the Private Attorney General Act of 2004 ("PAGA") is unenforceable, notwithstanding the holding of AT&T Mobility. (Ibid.)

In so holding, the Brown court noted, "The purpose of the PAGA is not to recover damages or restitution, but to create a means of "deputizing" citizens as private attorneys general to enforce the Labor Code. [Citations] Here, the relief is in large part 'for the benefit of the general public rather than the party bringing the action' [Citation], just as the claims for public injunctive relief [under the Unfair Competition Law and CLRA] in Broughton and Cruz...." (Id. at p. 501; see Cruz v. PacifiCare Health Systems, Inc. (2003) 30 Cal.4th 303, 307 [applying CRLA], id. at p. 312 ["requests for injunctive relief designed to benefit the public presented a narrow exception to the rule that the FAA requires state courts to honor arbitration agreements"].)

Thus, the Brown court recognized claims under PAGA are analogous to claims under the CLRA. The holding in Brown is therefore not limited to PAGA

claims, but applies, by its logic, to waivers of any statutory representative actions.

The court cannot enforce the waiver of Imburgia's right to bring a classwide action under the CLRA. The arbitration agreement states, "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable." Thus, the arbitration agreement is unenforceable.

Motion to Decertify is denied.

Status Conference is set for March 5, 2012 at 8:30 a.m. in this department.

Counsel are to file a joint status report by February 24, 2012.

Notice is waived.

No. 14-462

In the Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

–v–

AMY IMBURGIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JANUARY 28, 2014

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review a state Court of Appeal's application of neutral, nondiscriminatory state law principles of contract interpretation in determining whether there exists an agreement to arbitrate?

2. Whether the Court of Appeal erred in finding that the parties could select state law to the exclusion of federal law to determine the enforceability of a class action waiver?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

REASONS FOR DENYING THE WRIT 3

I. THE COURT OF APPEAL'S INTERPRETATION OF A CONTRACT UNDER CALIFORNIA STATE LAW IS NOT SUBJECT TO REVIEW BY THIS COURT 5

II. REVIEW SHOULD BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT HAS NOT RULED UPON THE ISSUE IN DISPUTE 10

III. REVIEW SHOULD BE DENIED BECAUSE THE CONFLICT BETWEEN THE OPINION HERE AT ISSUE AND *MURPHY* IS INSIGNIFICANT AND DOES NOT WARRANT THE ATTENTION OF THIS COURT 12

A. *Murphy* and the Opinion of the Court of Appeal Conflict Marginally, If at All 13

B. The Federal Question Raised by DirecTV's Petition Is Not Important Enough to Warrant Review by This Court 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 5

AT&T Mobility LLC v. Concepcion,
133 S.Ct. 1740 (2011) 2, 7

Discover Bank v. Superior Court,
34 Cal.4th 148 (2005) ..... passim

Fidelity Federal Savings & Loan v. de la Cuesta,
458 U.S. 141 (1982) 16

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 5, 7

Florida v. Meyers,
466 U.S. 380 (1984) 11

Granite Rock Company v. International Brotherhood of Teamsters,
561 U.S. 287 (2010) 7

Huber v. New Jersey Department of Environmental Protection,
131 S.Ct. 1308 (2011) 11

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 6, 7, 8, 9

Murphy v. DirecTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) ..... passim

Oxford Health Plans LLC v. Sutter,
133 S.Ct. 2064 (2013) 21

TABLE OF AUTHORITIES—Continued

Page

Parker v. Los Angeles County,
338 U.S. 327 (1949) 12

Prouty v. Gores Technology Group,
121 Cal.App.4th 1225 (2004) 8

Stolt-Nielsen S. A. v. AnimalFeeds International Corp.,
559 U.S. 662 (2010) 4, 20

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University,
489 U.S. 468 (1989) 6, 7

FEDERAL STATUTES

28 U.S.C. § 1257 6

Federal Arbitration Act (FAA) .....passim

STATE STATUTES

Business and Professions Code § 17200 1

Cal. Civ. Code § 1671(d) 1

Cal. Civ. Code § 1750 ..... 1, 14

Cal. Civ. Code § 1751 ..... 2, 15

Cal. Civ. Code § 1780 ..... 2, 15

Cal. Civ. Code § 1781 ..... 2, 15

Consumer Legal Remedies Act (CLRA) .....passim

TABLE OF AUTHORITIES—Continued

Page

RULES THE SUPREME COURT OF THE UNITED STATES

Sup. Ct. R. 10(c) 10, 17

OTHER AUTHORITIES

Contracts of H&R Block and MovieTickets.com, available at www.movietickets.com/privacy.asp#.U3ZdB50pDMo (last accessed Dec. 24, 2014) 20

Time Warner Cable Residential Services Subscriber Agreement, available at http://help.twcable.com/RSSA_English.pdf (last accessed Dec. 24, 2014) 18

T-Mobile Terms & Conditions available at (http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions) (last accessed Dec. 24, 2014) 18

INTRODUCTION

Review is not warranted here where Petitioner is not seeking review of an important federal question, but review of an intermediate state court decision based on the interpretation of contract language in DirecTV's 2007 Customer Agreement that applies only to Petitioner—language that is unique and uncommon to other market actors and which DirecTV itself has since changed and no longer uses.

Amy Imburgia and Kathy Greiner brought this case as a class action against petitioner DirecTV seeking damages and other relief as a representative action for themselves and other consumers who have been assessed an illegal penalty for early cancellation of their services under California's consumer protection statutes California Civil Code § 1671(d); violation of the Unfair Competition Law ("UCL"), Business and Professions Code § 17200 and the Consumers Legal Remedies Act ("CLRA"), Civil Code § 1750, *et seq.* DirecTV's acts were also the subject of investigation and penalties by the California State Attorney General.

After two and half years of litigation, DirecTV attempted to defend this action by invoking a provision in its arbitration agreement prohibiting class actions and also barring any representative claim. However, DirecTV's customer agreement and arbitration clause contain a unique and uncommon provision that provides such rights are waived only if it does not violate "the law of your state" and in

California, the CLRA entitles consumers to bring actions for unfair business practices (Cal. Civil Code sec. 1780), and to do so as a class (Cal. Civil Code sec. 1781), and prohibits and invalidates any contractual waiver of the right to sue as a class (Cal. Civ. Code sec. 1751). These provisions indisputably remain the law of the State of California and do not specifically target arbitration agreements.

Following denial of its Motion to Compel Arbitration at the trial court level, the Court of Appeal found the "law of your state" contractual provision refers to California state law—including state laws that are otherwise, in this instance, preempted by the FAA—including California's Consumer Legal Remedies Act (CLRA), which guarantees consumers the nonwaivable right to bring an action as a class for specified unfair business practices. Petitioner's Appendix at 8a-9a, and 12a-13a.

DirecTV now brings this writ of certiorari in the hope of obtaining relief from the self-drafted contract provision in its 2007 Customer Agreement. In an effort to dramatize its plea, DirecTV asserts that there exists a "stark" conflict between two judicial decisions which it claims applies to "millions of consumer contracts" and will create a huge problem of forum shopping in California. In a further effort to lure the attention of this Court, DirecTV claims repeatedly that the Court of Appeal's decision flouted this Court's decision in *AT&T Mobility LLC v. Concepcion*, 133 S.Ct. 1740 (2011) by applying the rule stated in *Discover Bank v. Superior Court*, 34 Cal.4th 148, to nullify the parties' arbitration provision. These contentions are incorrect.

REASONS FOR DENYING THE WRIT

First, the California Court of Appeal based its decision on interpretation of specific language in DirecTV's consumer agreement and in no way did it premise its decision on *Discover Bank* in any manner. Therefore, review is inappropriate here because the question of how to interpret language in an arbitration agreement is not a preemption issue, but a matter of state contract law.

Indeed, the Court of Appeal applied the precise rule at the crux of *Concepcion* and the FAA–it enforced the private arbitration agreement according to its terms which, unlike the agreement in *Concepcion*, the agreement here contains a more specific and unique class-waiver provision, stating that the customer may not sue as part of a class, but that the arbitration provision in its entirety is invalid if the class-waiver provision violates "the law of your state." The agreement in *Concepcion* did not include "the law of your state" language.

Thus, the only question is whether California law pertaining to contract interpretation was applied correctly, and not whether a particular statute or doctrine is preempted by the FAA. Ultimately, accepting review of this matter would involve this Court in a determination of whether the California Court of Appeal erred in its application of California state contract law. It is therefore not appropriate for review.

Second, this matter concerns the decision of a state intermediate court of appeal. The California

Supreme Court denied review. The Court should deny review of the issues presented herein until a final judgment and the California Supreme Court has directly addressed them.

Third, the supposed conflict between the decision of the Court of Appeal and the Ninth Circuit's decision in *Murphy v. DirecTV* conflict marginally, if at all, and, to the extent that they do, the conflict comes down to a question concerning the interpretation of seldom-used language in an unnecessary class waiver provision. As shown below, this conflict is not important enough to warrant review by this Court

Fourth, this matter is not one that will affect "millions of consumer contracts" but is instead a one-off case without broad application. This is because the term providing the class action waiver provision is enforceable only if it does not violate "the law of your state" is unique and uncommon to other consumer contracts. Furthermore, consumer agreements are adhesive and always contain provisions stating that the terms of the contract may be changed unilaterally by the drafting party. (See *infra*, n. 2.) Indeed, DirecTV itself has since eliminated from its Customer Agreement the contract language here at issue.

DirecTV has not pointed to any cases where a conflict concerning the language in its class waiver provision has arisen involving any market actor other than itself. This is presumably because class action waivers in general became unnecessary when this Court issued its opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 130

S.Ct. 1758 (2010). Since then, there has been no reason for a market actor to include any class action waiver in its consumer agreement, much less one where the waiver's enforceability is determined by "the law of your state" as an exception to the general applicability of the FAA.

In short, DirecTV has not pointed to an important conflict between the opinions of state and federal courts that will affect millions of contracts, but instead simply seeks relief from a contract provision in its 2007 Customer Agreement. Review should therefore be denied.

I. THE COURT OF APPEAL'S INTERPRETATION OF A CONTRACT UNDER CALIFORNIA STATE LAW IS NOT SUBJECT TO REVIEW BY THIS COURT

The question of whether the plaintiffs agreed to arbitrate their claims against DirecTV has little to do with the federal doctrine of preemption and everything to do with state law rules of contract interpretation. For this reason, review by this Court is inappropriate and should be denied.

The interpretation of contracts, including arbitration agreements, is a matter of state law. "States may regulate contracts, including arbitration clauses, under general contract law principles." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . should apply state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), citing to *Mastrobuono v.*

Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63 and at n. 9 (1995), and *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 475-476 (1989).

This Court does not review matters of state-law contract interpretation, unless the state-court determination denies a party's rights under the Constitution or a federal statute. "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt* at 474. *See also* 28 U.S.C. § 1257(a) [jurisdiction to grant review exists "where any . right . is claimed under the Constitution or the treaties or statutes of the United States."]

DirecTV claims that jurisdiction for review exists because the decision of the Court of Appeal violates sections 2 and 4 of the FAA. Petition at 3-5. This is inaccurate, however, because the FAA is not violated by the application of neutral, nondiscriminatory state laws pertaining to the interpretation of contracts. The "central purpose" of the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* at 53-54. In enacting the FAA, Congress sought to "place such agreements upon the same footing as other contracts." *Volt* at 474. Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Id.* at 479.

Consequently, even in instances where there does exist an agreement to arbitrate (unlike the present case), arbitration still may be denied on the basis of defenses to contract enforcement that do not discriminate against arbitration agreements. The

"savings clause" in Section 2 of the FAA "preserves generally applicable contract defenses," and bars enforcement only of "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 133 S.Ct. 1740 at 1748.

Nor does the interpretation of arbitration agreements in accordance with neutral state-law principles of contract interpretation violate the FAA's policy favoring arbitration. Recently, in *Granite Rock Company v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), this Court reversed an order compelling arbitration, and stated:

> Local is . wrong to suggest that the presumption of arbitrability we sometimes apply takes courts outside of our settled framework for deciding arbitrability. . As we have explained, this "policy" is merely an acknowledgment of the FAA's commitment to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Volt*, 489 U.S., at 478. Accordingly, we never held that this policy overrides the principle that a court may submit to arbitration "only those disputes that the parties have agreed to submit." *First Options*, 514 U.S., at 93.; *see also Mastrobuono*, 514 U.S., [at 52]. . Nor have we held that courts may use policy considerations as a substitute for party agreement. [Citations.] We have applied the presumption favoring arbitration, in

> FAA and labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that the arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and . is legally enforceable and best construed to encompass the dispute. [Citations.]

Id. at 302-303.

The dispute in this case concerns whether or not there exists an agreement to arbitrate. DirecTV's Customer Agreement states generally that the arbitration provision is governed by the FAA, but, more specifically, it states that the agreement to arbitrate does not exist if under "the law of your state" the class action waiver is unenforceable. Petitioner's Appendix at 5a ["If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable"].

The Court of Appeal applied California contract law principles in order to determine that this provision meant no agreement to arbitrate exists. The principles it applied are undeniably neutral, and do not in any way discriminate against arbitration agreements.

First, the California Court of Appeal applied the "'well established principle[] of contract interpretation'" that, "'when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision.'" Petitioner's Appendix at 8a-9a, quoting *Prouty v. Gores Technology Group*, 121 Cal.App.4th 1225, 1235 (2004). The court

determined that, "[t]he specific reference to state law concerning the enforceability of the class action waiver creates a narrow and specific exception to the general provision that the arbitration agreement will be governed by the FAA." Petitioner's Appendix at 12a.

Second, the Court of Appeal observed its "interpretation of the contract finds further support in 'the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.'" Petitioner's Appendix at 10a-11a, quoting *Mastrobuono v. Shearson Lehman Hutton, Inc., supra*, 514 U.S. at 62. In *Mastrobuono*, this Court reversed an order denying enforcement of an award in arbitration, stating that, "Respondents drafted an ambiguous document, and cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result." *Id.* at 63.

Similarly, the Court of Appeal found in the present case that "[a] reasonable reader of the customer agreement would naturally interpret the phrase 'the law of your state' as referring to (nonfederal) state law, and any ambiguity should be construed against the drafter." Petitioner Appendix at 13a.[1]

---

[1] In its Petition, DirecTV repeatedly mischaracterizes the Court of Appeal's contract-law analysis, stating that the court construed the "law of your state" provision to apply to "state law immune from the preemptive force of federal law" or "*hypothetical* state law immune from the preemptive force of federal law." Petition at 2, 8, and 10, orig emph. The Court of

In sum, the Court of Appeal properly concluded that under the terms of the contract, there exists no agreement to arbitrate, and it did so by way of a faithful application of the neutral, nondiscriminatory California state law pertaining to the interpretation of contracts. It is this application of state law that this Court would be sitting in review of were it to grant DirecTV's Petition. For this reason, review should be denied.

II. REVIEW SHOULD BE DENIED BECAUSE THE CALIFORNIA SUPREME COURT HAS NOT RULED UPON THE ISSUE IN DISPUTE

As shown above, this matter does not involve a federal question, and there is accordingly no statutory basis for a grant of review. However, even if there were, this matter concerns the decision of a state intermediate court of appeal, not a state supreme court. For this reason as well, review should be denied.

Supreme Court Rule 10(c) states, in pertinent part, that a case warranting review is one in which:

> a state court . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with the relevant decisions of this Court.

Appeal did no such thing. It did not find any law to be "immune from preemption," and, of course, there is nothing remotely "hypothetical" about the CLRA.

While it is permissible under this rule for a party to seek review in this Court of a decision of an intermediate state court of appeal, this Court has recognized that the presumption is against granting review in such cases. In *Huber v. New Jersey Department of Environmental Protection*, 131 S.Ct. 1308 (2011), this Court denied review, and four members of the Court joined in a statement which included the following remarks:

> This Court has not suggested that a State, by imposing heavy regulations on the use of privately owned residential property, may escape the Fourth Amendment's warrant requirement. But because this case comes to us on review of a decision by a state intermediate appellate court, I agree that today's denial of certiorari is appropriate. See this Court's Rule 10. It does bear mentioning, however, that "denial of certiorari does not constitute an expression of any opinion on the merits."

Id., emph. added.

In similar fashion, Justice Stevens observed many years ago in a dissenting opinion in *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852 (1984), that, "[I]f we take it upon ourselves to review and correct every incorrect disposition of a federal question by every intermediate state appellate court, we will soon become so busy that we will either be unable to discharge our primary responsibilities effectively, or else be forced to make still another adjustment in the size of our staff in order to process cases effectively." *Id.* at 385.

Finally, in *Parker v. Los Angeles County*, 338 U.S. 327, 70 S.Ct. 161 (1949), this Court declined to reach the constitutional issues argued by the petitioner on the ground that the matter was based upon a decision of the California Court of Appeal that the California Supreme Court had elected not to review, and also concerned state law issues that had not been determined by the California Supreme Court. *Id.* at 329. This Court stated, "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. Decent respect for California and its courts demands that this Court wait until the State courts have spoken with knowledge of the events brought to light for the first time at the bar of this Court." *Id.* at 333.

Based upon these authorities, this Court should deny review of the issues presented herein until such time as they have been ruled upon by the California Supreme Court.

III. REVIEW SHOULD BE DENIED BECAUSE THE CONFLICT BETWEEN THE OPINION HERE AT ISSUE AND *MURPHY* IS INSIGNIFICANT AND DOES NOT WARRANT THE ATTENTION OF THIS COURT

DirecTV's Petition is based on the supposed conflict between the decision of the Court of Appeal and the Ninth Circuit's decision in *Murphy v. DirecTV*. However, the opinions only marginally conflict, and to the extent they do, the conflict is far less important than DirecTV contends.

Both opinions concern a highly unique, one-off provision in a consumer contract which market

actors seldom use—indeed, DirecTV itself has revised its own contract and deleted the "law of your state" provision—and which they need not use, because it is unnecessary to accomplish its supposed purpose of preventing class arbitration. The conflict between *Murphy* and the opinion here at issue has not and will never result in the "forum shopping" problem that DirecTV envisions in its Petition. DirecTV's Petition should accordingly be denied.

A. *Murphy* and the Opinion of the Court of Appeal Conflict Marginally, If at All

Petitioner DirecTV points to a supposed conflict between the Ninth Circuit and the California Court of Appeal that it claims is "about as stark as they come." Petition at 9. This is a plain overstatement, based upon a misreading of the purportedly conflicting authorities.

Murphy concerned the rule of unconscionability stated in *Discover Bank v. Superior Court*, 34 Cal.4th 148 (2005). The parties in *Murphy* agreed the *Discover Bank* rule was no longer valid, having been found by this Court to be preempted by the FAA, however the plaintiffs therein contended that the rule should apply anyway, because the parties had entered into their contract at a time when the *Discover Bank* rule was understood to have been good law. *Murphy* at 1225. The *Murphy* court rejected this contention and affirmed the lower court's order compelling arbitration, holding this Court's finding of preemption meant that the *Discover Bank* rule had never been valid at any time, and thus could not govern the contract between the parties. *Id.* at 1225-1226.

The present case involves the same contract that was at issue in *Murphy*. And, in an effort to dramatize the conflict between *Murphy* and the opinion of the California Court of Appeal, DirecTV claims repeatedly that the Court of Appeal's opinion is based upon an application of the rule in *Discover Bank*. *See* Petition at 3 [the opinion "resurrect[s] the *Discover Bank* rule"]; at 8 [the court "appli[ed] the *Discover Bank* rule to nullify the parties' arbitration provision"]; at 8 [the court "[a]ppl[ied] the preempted *Discover Bank* rule"]; and at 16 [the court "refus[ed] to enforce the FAA-governed arbitration agreement . and resurrect[ed] the *Discover Bank* rule"].

The problem is that this claim, fundamental though it may be to DirecTV's Petition, is plainly inaccurate. Nowhere does the Court of Appeal base its decision on *Discover Bank*. The court does observe that "*Discover Bank* held that under certain circumstances, class action waivers in arbitration agreements are unconscionable and hence unenforceable." Petitioner's Appendix at 4a. However, the court does not find the *Discover Bank* rule would defeat arbitration in the present case, even if it were applicable. It simply states that DirecTV assumed the *Discover Bank* rule applied and therefore did not move to compel arbitration until after this Court found it to be preempted by the FAA. Petitioner's Appendix at 4a.

Instead of relying on the *Discover Bank* rule, the Court of Appeal relies on the CLRA, at California Civil Code section 1750 et seq. *See* Petitioner's Appendix at 6a, 9a, and 15a, n. 5. For example, the

court states, "If we apply state law alone (for example, the antiwaiver provision of the CLRA) to the class action waiver, then the waiver is unenforceable." Petitioner's Appendix at 9a. Elsewhere, the court states, "DirecTV argues that if the class action waiver is unenforceable as to plaintiffs' CLRA claims, then, at most, the arbitration agreement would be unenforceable as to those claims, and the motion to compel arbitration should have been granted as to the remainder of plaintiff' claims. We disagree." Appendix at 15a, n. 5. DirecTV ignores this entirely. Just as it did in its Petition for Review before the California Supreme Court, DirecTV fails in its Petition before this Court even to mention the CLRA.

The distinction between *Discover Bank* and the CLRA is an important one. In *Concepcion, supra*, 133 S.Ct. 1740, this Court invalidated altogether the *Discover Bank* rule, such that it was thereafter in no possible sense the law of the State of California. *Id.* at 1753. However, the same cannot be said of the CLRA, or the provisions therein which entitle consumers to bring actions for unfair business practices (Cal. Civil Code sec. 1780), and to do so as a class (Cal. Civil Code sec. 1781), and which invalidate any contractual waiver of the right to sue as a class (Cal. Civ. Code sec. 1751). These provisions indisputably remain the law of the State of California. The CLRA's non-waivable right to sue as a class may be preempted as to arbitration agreements governed by the FAA, but this does not affect its validity as a general matter—it still applies in cases where there is no arbitration agreement.

It may well be that under the law of preemption, the CLRA's non-waivable right to bring a class action is "'nullified to the extent that it actually conflicts with federal law.'" *Murphy* at 1226, quoting *Fidelity Federal Savings & Loan v. de la Cuesta*, 458 U.S. 141, 153 (1982), orig. emph. But this is not the end of the analysis from a contract interpretation standpoint. It is one thing to say that a valid state consumer protection statute is "nullified" to the extent it is preempted. However, it is something else entirely to say the parties to a contract cannot choose to be governed by the very same consumer protection statute when they agree that "the law of your state" applies to the contract's class waiver provision, as an exception to the general applicability of the FAA. Whether this is the proper reading of the contract cannot be determined on the basis of federal preemption. It must be determined on the basis of state contract law, which (as discussed above) is precisely what the Court of Appeal did.

Accordingly, if a district court in the Ninth Circuit were to confront precisely the issue that was before the California Court of Appeal in the present case, then it could find, reasonably, that the holding in *Murphy* does not extend beyond its application to the *Discover Bank* rule. The district court could find, just as the Court of Appeal did, that the CLRA is "the law of your state"—because it is incontestably the valid, statutory law of California—and the contract therefore calls for its application in determining the enforceability of the class waiver provision in the arbitration agreement.

For this reason, the two opinions conflict only marginally. And, to the extent that they do, the conflict comes down to a question concerning the interpretation of seldom-used language in an unnecessary class waiver provision. As shown below, this conflict does not merit review by this Court.

B. The Federal Question Raised by DirecTV's Petition Is Not Important Enough to Warrant Review by This Court

Under this Court's Rule 10(c), review is warranted only if "a state court has decided an important question of federal law that has not been, but should be, settled by this Court." This standard is unmet in the present case, because, to the extent that there is a "question of federal law" that the Court of Appeal has decided differently from the Ninth Circuit, the question is not remotely important enough to merit review by this Court.

If indeed there is a federal question before this Court arising from the conflict between *Murphy* and the decision of the Court of Appeal, then it is this: whether the doctrine of preemption is sufficient all on its own to compel the conclusion that the phrase "the law of your state" in the contract between DirecTV and the plaintiffs cannot possibly be understood to refer to valid state consumer protection statutes as an exception to the general applicability of the FAA.

DirecTV claims this question must be resolved because "'non-severability' clauses of the type here at issue are found in millions of individual consumer arbitration agreements in [California] and

elsewhere," thus giving rise to a "problem" of forum-shopping that is "truly monumental." Petition at 2. This claim is entirely unsubstantiated, and is disconnected from reality.

In support of its claim, DirecTV points this Court to a total of four form consumer agreements drafted by other market actors. Petition at 15-16. In fact, these agreements demonstrate the absence of any compelling reason for this Court to grant review.

First, two of the four consumer agreements that DirecTV discusses in its Petition contain a general "law of your state" provision that pertains to the entire contract, and not just to the arbitration agreement. *See* Petition at 15-16. This is true of both the Time Warner Cable Residential Services Subscriber Agreement at section 20(a), pp. 15-16 (http://help.twcable.com/RSSA_English.pdf), and the T-Mobile Terms & Conditions (http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions), at section 27, final sentence. For example, the T-Mobile provision states, "If any provision of the Agreement is invalid under the law of a particular jurisdiction, that provision will not apply in that jurisdiction."

The problem is that general severability provisions such as this are not relevant to DirecTV's Petition. This is because, inasmuch as such provisions pertain to the agreement as a whole, they do not state a specific exception to any general provision stating the arbitration agreement is governed by the FAA. Consequently, the rule of construction used by the Court of Appeal—that specific terms govern over more general ones—does

not apply to these provisions. This is clear from the Court of Appeal's discussion of this issue:

> [P]laintiffs contend that the reference to "the law of your state" in section 9 of the 2007 customer agreement operates as "a specific exception to the arbitration agreement's general adoption of the FAA" in section 10. That is, although the agreement provides that in general section 9 is governed by the FAA, section 9 itself provides that the specific issue of the enforceability of the class action waiver shall be governed by "the law of your state."

Petitioner's Appendix at 9a, orig. emph.

And, later:

> The specific reference to state law concerning the enforceability of the class action waiver creates a narrow and specific exception to the general provision that the arbitration provision will be governed by the FAA.

Petitioner's Appendix at 12a.

Accordingly, whatever conflict exists between *Murphy* and the opinion of the Court of Appeal will in no way bear upon judicial interpretations of agreements with the type of general severability provisions found in the T-Mobile and Time Warner Cable contracts. The language in these contracts is not governed by the decision of the California Court of Appeal, and thus the Court of Appeal's decision would provide a potential litigant with little reason to forum-shop.

Second, it is true that in the other two agreements cited by DirecTV, the "law of your state" language pertains specifically to the enforceability of the class waiver. *See* Petition at 15-16, citing to contracts of H&R Block and MovieTickets.com, at www.movietickets.com/privacy.asp#.U3ZdB50pDMo. These provisions are roughly similar to the one at issue in the present case. For example, the relevant provision in the MovieTickets.com Privacy Statement states, "If the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire paragraph (Class Action Waiver) is unenforceable."

However, as a general matter, it is not necessary for a market actor like MovieTickets.com even to put a class waiver in its arbitration provision.[2] This is because in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, this Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684,

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[2] Notably, each of the consumer agreements that DirecTV refers to in its Petition contain provisions stating that they are subject to change, unilaterally, by the drafting party. For example, the movietickets.com agreement states at its final sentence that, "MovieTickets.com reserves the right to change this Privacy Statement at any time. When we do, we will post the change(s) on the Site. If we change the Privacy Statement in a material way, we will provide appropriate online notice to you." *See also* T-Mobile Terms & Conditions, section 6 ["WE CAN CHANGE ANY TERMS IN THE AGREEMENT AT ANY TIME"], and Time Warner Residential Services Subscriber Agreement, section 8(a) ["We may change our Customer Agreements by amending the online version of the relevant document."]

orig. emph. And while there is the conceivable risk that an arbitrator will unexpectedly find that an agreement to submit to class arbitration is somehow implied in the contract (see *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013)), this risk is no doubt remote.

More importantly, however, if such a market actor wishes to avoid this risk altogether, it can still include a class action waiver. However, it must not do so in a way that makes the waiver's enforceability dependent on "the law of your state," as a specific exception to a more general provision stating that the agreement is governed by the FAA.

Indeed, DirecTV knows this as well as anyone. Section 10 of its current Customer Agreement still contains a provision stating that "Section 9 shall be governed by the Federal Arbitration Act." *See* DirecTV Customer Agreement, at section 10(b), at http://www.directv.com/ DTVAPP/ content/legal/custom er_agreement, effective June 24, 2014. However, the arbitration agreement at section 9 now states the following, in pertinent part:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claims as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. A court may sever any portion of Section 9 that it finds to be unenforceable, except for

> the prohibition on class, representative and private attorney general arbitration.

See current DirecTV Customer Agreement at section 9(c)(ii).

This provision prevents class arbitration. And, there is no reason why DirecTV could not have used this same provision in its 2007 agreement. Prior to this Court's decision in *Concepcion*, this provision would have accomplished the goal of preventing class arbitration, except in instances where the waiver was outlawed by *Discover Bank*. But instead, DirecTV used a provision that a reasonable consumer would believe gives him or her the benefit of California's consumer protection statutes. Both in 2007 and at the present time, if the only goal was to prevent class arbitration, then it made no sense for a market actor in DirecTV's position to base its class waiver's enforceability on "the law of your state," as an exception to the general applicability of the FAA.

Ultimately, there is no reason to infer a substantial number of market actors are in the same situation as DirecTV—having used a class waiver provision in the past that needlessly accords the full panoply of state statutory rights to any plaintiff looking to defeat the class waiver. Thus, review is not warranted here where Petitioner is not seeking review of an important federal question, but only correction of a perceived error made by an intermediate state court based on contract interpretation of language (not currently used by Petitioner) previously drafted by DirecTV

CONCLUSION

Based upon the foregoing, Respondents respectfully ask that this Court deny DirecTV's Petition for Writ of Certiorari.

Respectfully Submitted,

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IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second District

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

A. Respondents' Efforts To Deny This Court's Jurisdiction Are Unavailing. 1

B. Respondents' Efforts To Downplay The Conflict Between The Court Below And The Ninth Circuit Are Unavailing. 5

C. Respondents' Efforts To Minimize The Importance Of This Case Are Unavailing. 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 7, 11

Bell v. Hood,
327 U.S. 678 (1946).....2

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....3, 4

Discover Bank v. Superior Ct.,
113 P.3d 1100 (Cal. 2005).....6, 7

Fernandez v. California,
134 S. Ct. 1126 (2014) 8

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,
458 U.S. 141 (1982).....9

In re H&R Block Refund Anticipation Loan Litig.,
__ F. Supp. 2d __, 2014 WL 3672124
(N.D. Ill. July 23, 2014) 9

KPMG LLP v. Cocchi,
132 S. Ct. 23 (2011) (*per curiam*) 11

Marmet Health Care Center, Inc. v. Brown,
132 S. Ct. 1201 (2012) (*per curiam*) 3, 5

Meyer v. T-Mobile USA, Inc.,
836 F. Supp. 2d 994 (N.D. Cal. 2011) 7, 10

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 1, 2, 3, 5, 6, 11

Mutual Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 9

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*) 5, 11

Oxford Health Plans LLC v. Sutter,
133 S. Ct. 2064 (2013) 10

Perry v. Thomas,
482 U.S. 483 (1987).....7, 8

Prado Navarette v. California,
134 S. Ct. 1683 (2014) 8

Preston v. Ferrer,
552 U.S. 346 (2008).....8

Riley v. California,
134 S. Ct. 2473 (2014) 8

Southland Corp. v. Keating,
465 U.S. 1 (1984) 8

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010).....2, 3, 5, 10

Testa v. Katt,
330 U.S. 386 (1947).....11

Ting v. AT&T,
319 F.3d 1126 (9th Cir. 2003) 7

Volt Info. Sciences, Inc. v.
Board of Trs. of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989).....2, 8

Williamson v. Mazda Motor of Am., Inc.,
562 U.S. 323 (2011).....8

Constitution and Statutes

28 U.S.C. § 1257 8

Cal. Civ. Code § 1751 6

U.S. Const. art. VI.....5

INTRODUCTION

The brief in opposition only confirms that this Court's review is warranted. Respondents do not seriously deny that the decision below conflicts with the Ninth Circuit's decision in *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013), which enforced the *same* arbitration agreement at issue here and dismissed the reasoning adopted by the court below as "nonsensical." Rather, respondents attempt to shield the conflict from this Court's review by asserting that it (1) involves nothing more than state contract law, and is thus "not subject to review by this Court," Opp. 5-10 (capitalization modified), (2) is "marginal," and involves an intermediate state court, *see id.* at 10-17, and (3) is "not important," *see id.* at 17-22 (capitalization modified). Each of these arguments is manifestly incorrect.

ARGUMENT

A. Respondents' Efforts To Deny This Court's Jurisdiction Are Unavailing.

Respondents lead with the remarkable assertion that this Court lacks "jurisdiction" to review a state court's refusal to enforce an arbitration agreement governed by the Federal Arbitration Act (FAA). Opp. i, 6. That assertion conflates jurisdiction with the merits. Respondents contend that this Court lacks "jurisdiction" over this case because, in their view, "the FAA is not violated" here. *Id.* at 6.

But that is the whole dispute—the parties disagree on whether the court below violated the FAA, a federal statute, by refusing to enforce an arbitration agreement concededly governed by that statute. Respondents are obviously free to argue

that there was no such violation, but the question whether federal law has been violated itself presents a federal question subject to this Court's review. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682 (1946).

In light of the FAA, it is simply not true that "the question of how to interpret language in an arbitration agreement is not a preemption issue, but a matter of state contract law." Opp. 3. This Court "ha[s] said on numerous occasions that the central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced *according to their terms*." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (emphasis added; internal quotations omitted). It follows that the interpretation and enforcement of arbitration agreements governed by the FAA involves a hybrid of state and federal law. "While the interpretation of an arbitration agreement is generally a matter of state law," *id.* at 681, the FAA ensures that, as a matter of *federal* law, the agreement is interpreted and enforced in a way that "give[s] effect to the intent of the parties," *id.* at 684. Under the FAA, thus, "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Id.* at 682 (quoting *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).

The court below flouted that federal mandate by refusing to enforce an arbitration agreement governed by the FAA on a "nonsensical" ground. *Murphy*, 724 F.3d at 1226. As the Ninth Circuit explained, far from indicating their assent to state laws requiring classwide arbitration, the parties here

"did exactly the opposite"—they "agreed not to arbitrate only if state law required the availability of class arbitration procedures to enforce the arbitration clause." *Id.* at 1228. Because the FAA preempts any such state-law requirements, "there is no conflict between the reference to 'the law of your state' in Section 9 of the Customer Agreement and the reference to the FAA in Section 10." *Id.* By refusing to enforce the arbitration agreement based on state law preempted by the FAA, Pet. App. 7-15a, the state court below thus turned the parties' arbitration agreement on its head and made a mockery of the "emphatic federal policy in favor of arbitral dispute resolution," *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (*per curiam*) (internal quotation omitted).

Were respondents correct that the interpretation and enforcement of arbitration agreements governed by the FAA is purely a matter of state law, the statute would be a nullity—courts hostile to arbitration would be free to invoke state-law contract principles at will to defeat the parties' intent. That is not the law. Thus, in *Stolt-Nielsen*, this Court held as a matter of *federal* law that contractual silence with respect to classwide arbitration cannot be interpreted as consent to classwide arbitration, regardless of contrary state law. *See* 559 U.S. at 684-87. Similarly, in *Buckeye Check Cashing, Inc. v. Cardegna*, this Court held as a matter of *federal* law that an arbitration clause is severable from the rest of the contract, regardless of contrary state law. 546 U.S. 440, 445-49 (2006). Needless to say, these decisions would be inexplicable if, as respondents contend, the FAA has no role to play in the

interpretation and enforcement of arbitration agreements according to their terms.

Respondents appear grudgingly to acknowledge this point, arguing that "[t]his Court does not review matters of state-law contract interpretation, *unless the state-court determination denies a party's rights under ... a federal statute*." Opp. 6 (emphasis added). But that is exactly what has happened here. The decision below denied petitioner its federal arbitration rights by refusing to enforce an arbitration agreement governed by the FAA by relying on state law preempted by the FAA.

Respondents fare no better by trying to change the subject, and asserting that "[t]he dispute in this case concerns whether or not there *exists* an agreement to arbitrate." Opp. 8 (emphasis added). That assertion is mystifying. There has never been any dispute here over the existence of an arbitration agreement. *See* Pet. App. 4a (quoting parties' agreement that, if they could not resolve a dispute informally, then "any Claim either of us asserts will be resolved only by binding arbitration"). Rather, the dispute here is, and always has been, whether that agreement is *enforceable* where it would be unenforceable under state law preempted by the FAA. Because there is no dispute that the parties here entered into an arbitration agreement, *see Buckeye*, 546 U.S. at 444-46 & n.1, and that this agreement is governed by the FAA, *see* Pet. App. 5a (parties' arbitration agreement "shall be governed by the Federal Arbitration Act"), there can be no dispute that this case presents the federal question whether the parties' agreement is being enforced

"according to [its] terms," *Stolt-Nielsen*, 559 U.S. at 682 (internal quotation omitted).

Indeed, if anything, respondents' argument that the interpretation and enforcement of an arbitration agreement governed by the FAA "is purely a matter of state law for state-court determination is all the more reason for this Court to assert jurisdiction." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*). Federal law is "the supreme Law of the Land," U.S. Const. art. VI, and the refusal of state courts to enforce the FAA, like any other federal statute, manifestly presents a federal question subject to, and worthy of, this Court's review. *See, e.g.*, *Marmet*, 132 S. Ct. at 1202 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.").

B. Respondents' Efforts To Downplay The Conflict Between The Court Below And The Ninth Circuit Are Unavailing.

Respondents next assert that this Court's review is unwarranted because the decision below and the Ninth Circuit's decision in *Murphy* conflict "only marginally," Opp. 12, 17, and the court below is only an intermediate state appellate court, *id.* at 10-12. Again, these assertions do not withstand scrutiny.

There is nothing "marginal" about the conflict between the decision below and the Ninth Circuit's decision in *Murphy*. Both cases involved the *same* language in the *same* arbitration agreement governed by the *same* law, and the Ninth Circuit enforced that agreement while the court below refused to do so. The Ninth Circuit dismissed the reasoning adopted by the court below as

"nonsensical," 724 F.3d at 1226, while the court below dismissed the Ninth Circuit's analysis as "unpersuasive," Pet. App. 13a. It is hard to imagine a more direct conflict than this.

Respondents nonetheless try to distinguish this case from *Murphy* by arguing that state law at issue in *Murphy* was the judge-made rule of *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005), whereas the state law at issue here is the statutory anti-waiver provision of the Consumers Legal Remedies Act (CLRA), Cal. Civ. Code § 1751. Opp. 13-17. That argument is both baseless and immaterial.

As an initial matter, there is no basis for respondents' assertion that the court below refused to enforce the parties' agreement based on the CLRA's anti-waiver provision, as opposed to the *Discover Bank* rule. The court certainly never said so; to the contrary, the court justified its result in part on the theory that "[a]s a practical matter, it seems unlikely that plaintiffs anticipated in 2007 that the Supreme Court would hold in 2011 that the FAA preempts the *Discover Bank* rule concerning the enforceability of class action waivers in arbitration agreements." Pet. App. 11a (internal quotation omitted); *see also id.* at 6a ("Plaintiffs argue that the law of California would find the class action waiver unenforceable because, *for example*, the CLRA expressly precludes waiver of the right to bring a class action under the CLRA.") (emphasis added).

There was no reason for the court below to distinguish between the *Discover Bank* rule and the CLRA's anti-waiver provision, because both sources of state law purport to preclude the enforcement of arbitration agreements with a class-action waiver.

And for just that reason, the FAA preempts both of them. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). Regardless of whether state law purports to require classwide arbitration through a judge-made rule or a statute, any such requirement conflicts with the FAA. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (FAA preempts inconsistent "state law, whether of legislative or judicial origin"). Indeed, the Ninth Circuit held more than a decade ago that the FAA preempts the CLRA's anti-waiver provision. *See Ting v. AT&T*, 319 F.3d 1126, 1147-48 (9th Cir. 2003); *see also Meyer v. T-Mobile USA, Inc.*, 836 F. Supp. 2d 994, 1001 (N.D. Cal. 2011) (Breyer, J.) ("Plaintiffs' citations to the CLRA and *Discover Bank* are misplaced, as the FAA preempts both."). Indeed, respondents themselves acknowledge that "[t]he CLRA's non-waivable right to sue as a class may be preempted as to arbitration agreements governed by the FAA." Opp. 15. Thus, whether the court below applied the *Discover Bank* rule, the CLRA's anti-waiver provision, or both, is legally irrelevant: what matters is that the court applied state law preempted by the FAA to refuse to enforce an arbitration agreement governed by the FAA.

Finally, respondents miss the mark by arguing that review of this conflict is unwarranted because "the California Supreme Court has not ruled upon the issue in dispute." Opp. 10 (capitalization modified). The California Court of Appeal, unlike some other intermediate state appellate courts, binds every state trial court in the Nation's largest State.

See Pet. 9. Thus, this Court routinely reviews that court's judgments where, as here, the California Supreme Court has denied discretionary review. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473 (2014); *Prado Navarette v. California*, 134 S. Ct. 1683 (2014); *Fernandez v. California*, 134 S. Ct. 1126 (2014); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011). Indeed, several of this Court's leading precedents in the arbitration area involve cases on review from the California Court of Appeal. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 351 (2008); *Volt*, 489 U.S. at 471-73; *Perry*, 482 U.S. at 488-89. It would certainly be perverse for this Court to decline to protect federal arbitration rights in California, or to resolve a conflict between federal and state courts in that State on the scope of such rights, just because the California Supreme Court (over a dissent) has declined to do so. Because the California Court of Appeal refused to enforce the arbitration agreement at issue here, and the California Supreme Court declined to review that decision, the matter is ripe for this Court's review. *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (state-court decision refusing to enforce federal arbitration rights is final and reviewable by this Court under 28 U.S.C. § 1257).

C. Respondents' Efforts To Minimize The Importance Of This Case Are Unavailing.

Respondents finally urge this Court to deny review by asserting that the conflict between the Ninth Circuit and the California Court of Appeal is "not remotely important enough" for this Court to resolve. Opp. 17. That assertion fails on two levels.

At a basic level, respondents err by characterizing the legal issues presented here as "unique." Opp. 1, 3, 4, 12. Obviously, virtually every arbitration agreement is different. But that does not mean that the interpretation and enforcement of such agreements can never present important federal issues under the FAA. Rather, different arbitration agreements can present common legal issues. This case presents one such issue: whether a court may refuse to enforce an arbitration agreement governed by the FAA by construing a reference to state law to include state law preempted by the FAA (and thus "nullified," *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982), and "without effect," *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2470, 2473, 2477 (2013) (internal quotation omitted)).

Such references to state law, as explained in the petition, are present in *millions* of consumer arbitration agreements governed by the FAA. *See* Pet. 14-16. Respondents do not seriously dispute that point. Indeed, they grudgingly concede that the H&R Block and MovieTickets.com arbitration agreements are materially indistinguishable from the agreement at issue here. *See* Opp. 20; *see also In re H&R Block Refund Anticipation Loan Litig.*, __ F. Supp. 2d __, 2014 WL 3672124, at *5 (N.D. Ill. July 23, 2014) (rejecting decision below). And they try to distinguish the T-Mobile and Time Warner agreements on the ground that the reference to state law in those agreements applies not only to the class-action waiver but also to other provisions of the agreement. Opp. 18-19. But the reasoning of the decision below applies equally to those agreements, which explains why that reasoning has been used to

challenge those agreements. *See Meyer*, 836 F. Supp. 2d at 1001. The decision below ensures that the enforcement of FAA-governed arbitration agreements in California will depend on whether the dispute is litigated in state or federal court.

Undeterred, respondents fall back on the argument that the issue is unimportant because companies are generally free to alter their arbitration agreements to remove class-action waivers altogether. Opp. 20-21. Such waivers, respondents assert, are "unnecessary" in light of *Stolt-Nielsen*, which establishes a general default rule that contractual silence cannot be construed as consent to classwide arbitration. *See id.* at 4, 13, 17, 20. That argument might have some force if this Court were the only adjudicative body in the land, but it is not. Other courts and arbitrators also construe arbitration agreements, and they may purport to find indicia that the parties sought to depart from this background rule even where this Court would not. *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067-70 (2013). Thus, out of an abundance of caution, prudent parties still include class-action waivers in their arbitration agreements, and there is no reason to penalize them for doing so.

Respondents nonetheless suggest that the issue is not important because petitioner itself has since amended its arbitration agreement to remove the reference to state law from the non-severability clause. *See* Opp. 1, 4, 21-22. But that change, of course, has no bearing on former customers, like respondents, who are not parties to the new agreement. Petitioner and other affected companies

are powerless to alter their arbitration agreements in a way that would affect their former customers. And, as the Ninth Circuit's *Murphy* decision makes clear, petitioner and other affected companies should not be required to alter their arbitration agreements at all, because it is "nonsensical" to interpret a provision designed to prevent classwide arbitration to negate arbitration altogether by resurrecting state law preempted by the FAA. 724 F.3d at 1226.

At an even deeper level, however, this case is important because it reflects "the judicial hostility towards arbitration that prompted the FAA" in the first place. *Concepcion*, 131 S. Ct. at 1747; *see also id.* ("California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts."). Precisely because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration[,] ... [i]t is a matter of great importance ... that state ... courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501; *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) (*per curiam*) ("State courts ... have a prominent role to play as enforcers of agreements to arbitrate.") (internal quotation omitted). State courts may not always like federal law, but they are duty-bound to enforce it. *See, e.g.*, *Testa v. Katt*, 330 U.S. 386, 389-94 (1947).

Because it embraced a "nonsensical" theory to thwart federal rights, *Murphy*, 724 F.3d at 1226, the decision below cannot be dismissed as a harmless error. Rather, it can only be characterized as state-court defiance of federal law. This Court, which alone can vindicate the supremacy of federal law in

state court, should not tolerate or encourage such insubordination. Because the state court below refused to enforce federal law, and in the process created a direct conflict with the Ninth Circuit, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant review.

Respectfully submitted,

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No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

JOINT APPENDIX

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May 29, 2015

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 21, 2014
CERTIORARI GRANTED MARCH 23, 2015

TABLE OF CONTENTS

Page

Relevant Docket Entries,
California Supreme Court 1

Relevant Docket Entries,
California Court of Appeal 3

Relevant Docket Entries,
Superior Court of California,
County of Los Angeles 10

Reply in Support of DIRECTV, Inc.'s
Mot. to Stay Pending the Conclusion of First-Filed
Federal Proceedings (excerpt),
filed 2/6/09 51

First Am. Class Action Compl.,
filed 3/16/09 56

Answer to First Am. Class Action Compl.,
filed 2/16/10 98

Decl. of Valerie W. McCarthy Filed in Support of
DIRECTV's Mot. to Compel Arbitration,
filed 5/17/11 105

Ex. A to Decl. of Valerie W. McCarthy:
2001 Customer Agreement
filed 5/17/11 114

Ex. B to Decl. of Valerie W. McCarthy:
2004 Customer Agreement
filed 5/17/11 118

Ex. C to Decl. of Valerie W. McCarthy:
2006 Customer Agreement
filed 5/17/11 122

Ex. D to Decl. of Valerie W. McCarthy:
2007 Customer Agreement
filed 5/17/11 126

Ex. E to Decl. of Valerie W. McCarthy:
2009 Customer Agreement
filed 5/17/11 130

Ex. F to Decl. of Valerie W. McCarthy:
2010 Customer Agreement
filed 5/17/11 134

Ex. G to Decl. of Valerie W. McCarthy:
2011 Customer Agreement
filed 5/17/11 138

Pls.' Opp. to Defs.' Mot. to Dismiss or Stay
Proceedings Pending Arbitration and to Compel
Arbitration (excerpt),
filed 8/5/11 142

APPELLATE COURTS
CASE INFORMATION

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Docket (Register of Actions)

IMBURGIA v. DIRECTV
Case Number S218686

Date	Description	Notes
05/19/2014	Petition for review filed	Defendant and Appellant: Directv, Inc. Attorney: Melissa D. Ingalls
05/19/2014	Record requested	
05/19/2014	Application to appear as counsel pro hac vice (pre-grant)	Christopher Landau of Washington, D.C. requests to appear as counsel pro hac vice on behalf of appellant.
05/22/2014	Received Court of Appeal record	one doghouse (volume 1 of 2)
06/10/2014	Answer to petition for review filed	Plaintiff and Respondent: Amy Imburgia Attorney: Paul Daniel Stevens Plaintiff and Respondent: Kathy Greiner Attorney: Paul Daniel Stevens Filed pursuant to CRC, rule 8.25(b).
06/19/2014	Reply to answer to petition filed	Defendant and Appellant: Directv, Inc. Attorney: Melissa D. Ingalls

07/10/2014	Time extended to grant or deny review	The time for granting or denying review in the above-entitled matter is hereby extended to and including August 15, 2014, or the date upon which review is either granted or denied.
07/23/2014	Petition for review denied	The application to appear as counsel pro hac vice is granted. Baxter, J., is of the opinion the petition should be granted.
07/31/2014	Returned record	1 doghouse

APPELLATE COURTS
CASE INFORMATION

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

2nd Appellate District

Docket (Register of Actions)

Imburgia et al. v. Directv, Inc.
Division 1
Case Number B239361

Date	Description	Notes
02/27/2012	Notice of appeal lodged/received.	noa 2/21/12 Directv, Inc.
02/27/2012	Filing fee.	check #97029
02/27/2012	Letter sent to:	all parties re: pro hac vice representation.
03/08/2012	Certificate of interested entities or persons filed by:	Attorney: Shaun Paisley Party: Directv Inc.
03/08/2012	Civil case information statement filed.	Attorney: Shaun Paisley Party: Directv Inc.
08/24/2012	Record on appeal filed.	C-7, R-1
08/24/2012	Order filed.	e-brief order issued to all counsel.
08/31/2012	Record imaged.	to ricoh
08/31/2012	Change of address filed for:	Consumer Watchdog - Harvey Rosenfield (Resp counsel)
08/31/2012	Default notice for responsive filing	Harvey Rosenfield c/o Consumer Watchdog (Resp

	fee sent to:	counsel)
09/05/2012	Record imaged.	from ricoh
09/06/2012	Filing fee.	Resp fee Check #67218
10/17/2012	Appellant notified re failure to timely file opening brief.	Directv, Inc.
11/01/2012	Appellant's opening brief.	Defendant and Appellant: Directv, Inc. Attorney: Robyn Eileen Bladow
11/02/2012	Filed proof of service.	re AOB on trial judge
11/30/2012	Received:	stip for ext of time to file RB & ARB; need association of counsel by Milstein Adelman LLP in regards to Amy Imburgia
12/07/2012	Association of attorneys filed for:	respondents Imburgia & Greiner; Evans Law Firm & Milstein Adelman LLP
12/07/2012	Stipulation of extension of time filed to:	Respondent's brief. Due on 12/26/2012 By 23 Day(s) **as to resp Imburgia & Greiner to 12/26/2012 & +20 days ARB**
12/07/2012	Respondent notified re failure to file respondent's brief.	resp Mecca
12/07/2012	Filed letter from:	atty Ingrid Evans in regards to Marlene Mecca who was

		dismissed out of the lower court action on 1/4/2011 and is not party to this appeal (see attached)
01/04/2013	Respondent notified re failure to file respondent's brief.	
01/22/2013	Respondent's brief.	Plaintiff and Respondent: Amy Imburgia Attorney: Mayo Lawrence Makarczyk Plaintiff and Respondent: Kathy Greiner Attorney: Freda Edith Mermelstein
02/13/2013	Stipulation of extension of time filed to:	Appellant's reply brief. Due on 03/25/2013 By 21 Day(s)
03/25/2013	Appellant's reply brief.	Defendant and Appellant: Directv, Inc. Attorney: Robyn Eileen Bladow
03/26/2013	Case fully briefed.	
04/09/2013	To court.	letter by aplt Directv with additional case cite; needs permission to file
04/30/2013	Filed letter from:	atty Robyn E. Bladow for appellant Directv, Inc., citing new authority (permission to filed is granted)
07/23/2013	To court.	letter by aplt Directv with additional case cite; needs

		permission to file
08/16/2013	To court.	letter by aplt DirectTV [*sic*] dtd 8-16-2013 re addtional [*sic*] case cite; needs permission to file
10/29/2013	To court.	letter by respondents Imburgia et al. undated re addtional [*sic*] case cite; needs permission to file
12/27/2013	To court.	letter brief by atty Paisley on behalf of aplt DirectTV [*sic*] dtd 12-27-2013 needs permission to file
12/27/2013	To court.	Appellant DirecTV's letter dtd 12-27-2013 submitting additional case cites; needs permission to file
01/06/2014	Filed proof of service.	Amended proof of service re Letter from atty Shaun Paisley rec'd on 12/27/2013
01/06/2014	Filed proof of service.	Amended Proof of Service re Appellant DirecTV's 2nd letter dtd 12-27-2013
01/07/2014	Filed additional cites for oral argument.	by aplt DirecTV, Inc. re Lombardi II; **filed by permission**
01/09/2014	Filed additional cites for oral argument.	by aplt DirecTV re Lombardi I; **filed by permission**
02/21/2014	Calendar notice sent. Calendar date:	3/19/14 @ 9:00 a.m.

03/03/2014	To court.	letter brief by aplt DirectTV [*sic*] re new authority (Ferguson); need permission to file
03/07/2014	To court.	letter brief by DirecTV re new authority (Sanchez); needs permission to file
03/10/2014	Letter brief filed.	Defendant and Appellant: Directv, Inc. Attorney: Robyn Eileen Bladow **by permission** (Ferguson)
03/11/2014	Letter brief filed.	Defendant and Appellant: Directv, Inc. Attorney: Robyn Eileen Bladow **by permission** (Sanchez)
03/14/2014	Letter brief filed.	Plaintiff and Respondent: Amy Imburgia Attorney: Ingrid Maria Evans **by permission** re new authority re Moreno
03/14/2014	Letter brief filed.	Defendant and Appellant: Directv, Inc. Attorney: Robyn Eileen Bladow **by permission** re new authority Murphy
03/14/2014	Letter brief filed.	Defendant and Appellant: Directv, Inc. Attorney: Robyn Eileen Bladow **by permission** re new authority (Amex)
03/19/2014	Cause argued and submitted.	

04/01/2014	To court.	Letter brief by DirecTV re Clements case; need permission to file
04/02/2014	Letter brief filed.	Defendant and Appellant: Directv, Inc. Attorney: Robyn Eileen Bladow **re Clements** by permission**
04/07/2014	Opinion filed.	(Signed Published) The order is affirmed. Respondents shall recover their costs of appeal./11 pgs/R-C-Miller
05/20/2014	Record transmitted to Supreme Court.	1x4"
05/20/2014	Service copy of petition for review received.	s218686
06/10/2014	Answer to petition for review received.	
07/10/2014	Ext. by Supreme Court re: petition for hearing filed:	
07/25/2014	Motion filed.	by atty Melissa D. Ingalls for appellant DIRECTV, Inc., Motion to Stay Issuance of Remittitur Pending Resolution of DIRECTV'S Petition for Writ of Certiorari to US Supreme Court
07/28/2014	Order filed.	Appellant's motion filed July 25, 2014 to stay issuance of remittitur is denied.

07/23/2014	Petition for review denied in Supreme Court.	
07/30/2014	Remittitur issued.	7/21.
07/30/2014	Case complete.	
08/06/2014	Record returned from Supreme Court.	1x4"

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

CASE SUMMARY

Case Number: BC398295
AMY IMBURGIA ET AL VS DIRECTV INC

Filing Date: 09/17/2008
Case Type: Other Contract (General Jurisdiction)
Status: Pending

Cases Related: BC398431 on 09/29/2008

Cases Related: BC398316 on 09/29/2008

Future Hearings

08/07/2015 at 09:00 am in department 311 at 600 South Commonwealth Ave., Los Angeles, CA 90005 Status Conference (Joint status report to be filed by 7/31/15)

Parties

CONSUMER WATCHDOG Attorney for Plaintiff/Petitioner

DIRECTV INC. Defendant/Respondent

DOES 1-100 Defendant/Respondent

EVANS LAW FIRM Attorney for Plaintiff/Petitioner

GREINER KATHY [BC398431] Plaintiff/Petitioner

IMBURGIA AMY Plaintiff/Petitioner

KIRKLAND & ELLIS LLP Attorney for Defendant/Respondent

LAW OFFICES OF F. EDIE MERMELSTEIN Attorney for Plaintiff/Petitioner

MECCA MARLENE Plaintiff/Petitioner

MILSTEIN ADELMAN LLP Attorney for Plaintiff/Petitioner

PAUL GARY M. ESQ. Attorney for Plaintiff/Petitioner

SCHNEIDER WALLACE COTTRELL BRAYTON KONECK - Attorney for Plaintiff/Petitioner

SPRENGER & LANG PLLC Attorney for Plaintiff/Petitioner

WATERS KRAUS & PAUL Former Attorney for Pltf/Petnr

Documents Filed

02/18/2015 Stipulation and Order (continuing status conference pending resolution of Directv's petition for writ of certioraro [*sic*] conformed copy in pick up box) Filed by Attorney for Plaintiff/Petitioner

02/13/2015 Miscellaneous-Other
(CASE ANYWHERE POSTING)
Filed by Clerk

09/24/2014 Notice (OF ORDER STAYING PROCEEDINGS PENDING RESOLUTION OF DIRECTV'S PETITION FOR WRIT OF CERTIORARI TO U.S. SUPREME COURT AND SETTING STATUS CONFERENCE)
Filed by Attorney for Defendant/Respondent

09/11/2014 Stipulation and Order (staying proceedings pending resolution of Directv's petition for writ of Certiorari to United States Supreme Court conformed copy mailed)
Filed by Attorney for Defendant/Respondent

09/09/2014 Memo of Costs on Appeal ($1,504.45 COSTS ON APPEAL APPROVED 10/02/14 MEMO TO SCAN UNIT 10/02/14 COSTS ENTERED BASE ON REMITTITUR)
Filed by Attorney for Pltf/Petnr

08/25/2014 Notice of Status Conference filed (OF STATUS CONFERENCE AND ORDER)
Filed by Attorney for Plaintiff/Petitioner

08/14/2014 Notice (NOTICE OF STATUS CONFERENCE AND ORDER (6))
Filed by Court

08/08/2014 Remittitur (Remittitur issued on 7/30/14; S/T CC WON 8/12/14;)
Filed by Clerk

08/06/2014 Notice of Status Conference filed
Filed by Clerk

10/31/2013 Notice (of case reassignment)
Filed by Attorney for Defendant/Respondent

10/11/2012 Notice of Change of Address Filed by Attorney for Plaintiff/Petitioner

09/04/2012 Notice of Change of Address Filed by Attorney for Plaintiff/Petitioner

03/20/2012 Ntc to Reptr/Mon to Prep Transcrpt [*sic*] Filed by Clerk

03/09/2012 Notice of Designation of Record Filed by Attorney for Plaintiff/Appellant

03/02/2012 Notice (OF DESIGNATING RECORD ON APPEAL)
Filed by Attorney for Defendant/Respondent

03/02/2012 Notice of Designation of Record Filed by Attorney for Deft/Respnt

02/27/2012 Order (continuing status conference until conclusion of appeal and tolling time in which to bring action to trial conformed copy mailed)
Filed by Attorney for Defendant/Respondent

02/24/2012 Miscellaneous-Other (JOINT STATUS REPORT AND STIPULATION RE TOLLING OF TIME IN WHICH TO BRING ACTION TO TRIAL)
Filed by Attorney for Defendant/Respondent

02/22/2012 Notice (OF STAY OF ALL TRIAL COURT PROCEEDINGS PENDING APPEAL FROM ORDER DENYING DIRECTV'S MOTION TO DISMISS OR STAY PROCEEDINGS PENDING ARBITRATION AND TO COMPEL ARBITRATION)
Filed by Attorney for Defendant/Respondent

02/21/2012 Notice of Appeal
Filed by Attorney for Deft/Respnt

01/31/2012 Notice (OF ENTRY OF ORDERS AFTER HEARING)
Filed by Attorney for Plaintiff/Petitioner

12/14/2011 Notice (AND ORDER OF CASE REASSIGNMENT)
Filed by Attorney for Defendant/Respondent

12/02/2011 Miscellaneous-Other (SUPPLEMENT TO SUMBISSION [*sic*] IN SUPPORT OF MOTION TO COMPEL ARBITRATION)
Filed by Attorney for Defendant/Respondent

12/02/2011 Objection Document (PLNTFFS' OBJ & REPLY TO DIRECTV, INC.'S RESPONSE TO PLNTFFS' PRIOR OBJ TO DEFT'S SUPPLEMENTAL BRIEF ISO MTN TO COMPEL ARBITRATION)
Filed by Attorney for Plaintiff/Petitioner

12/01/2011 Notice (OF PROCEEDINGS)
Filed by Attorney for Defendant/Respondent

11/30/2011 Response (DIRECTV'S RESPONSE TO PLNTFFS' OBJ TO SUPPLEMENTAL BRIEF ISO MTN TO COMPEL ARBITRATION).
Filed by Attorney for Defendant/Respondent

11/22/2011 Objection Document (PLNTFFS' OBJ TO DEFTS SUPPLEMENTAL BRIEF RE: MTN TO COMPEL ARBITRATION)
Filed by Attorney for Plaintiff/Petitioner

11/18/2011 Brief-Supplemental (DIRECTV'S SUPPLEMENTAL BRIEF ISO MTN TO COMPEL ARBITRATION)
Filed by Attorney for Defendant/Respondent

11/17/2011 Brief (PLAINTIFF'S BRIEF RE: POST CONCEPCION DECISIONS Filed by: Milstein Adelman LLP On behalf of: Plaintiffs _____)
Filed by Attorney for Plaintiff/Petitioner

10/13/2011 Notice (of OCTOBER 12, 2011 HEARING ON DIRECT TV's MTN TO SEAL)
Filed by Attorney for Defendant/Respondent

10/12/2011 Order (GRANTING DIRECTV'S MOTION TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

10/04/2011 Notice (NTC OF NON-OPP TO DEFT'S MTN TO SEAL DOCUMENTS RE: BC398431 (GREINER))
Filed by Attorney for Plaintiff/Petitioner

09/15/2011 Objection Document (AND RESPONSE TO D's MISSTATEMENTS RE P's NTC OF ORDER IN FEDERAL PROCEEDINGS)
Filed by Attorney for Plaintiff/Petitioner

09/12/2011 Response (DIRECTV'S RESPONSE TO PLNTFFS' NTC OF ORDER IN FEDERAL MDL PROCEEDING)
Filed by Attorney for Defendant/Respondent

09/09/2011 Notice (NTC OF ORDER IN FEDERAL MDL PROCEEDING DENYING IN PART DEFT DIRECTV'S MTN TO COMPEL ARBITRATION)
Filed by Attorney for Plaintiff/Petitioner

08/30/2011 Notice (SECOND NTC OF RECENT AUTHORITY ISO DIRECTV'S MTN TO DISMISS OR STAY PROCEEDINGS PENDING ARBITRATION & TO COMPEL ARBITRATION)
Filed by Attorney for Defendant/Respondent

08/29/2011 Proof of Service
Filed by Attorney for Defendant/Respondent

08/29/2011 Declaration (DECL OF SHAUN PAISLEY ISO DIRECTV'S MTN TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

08/29/2011 Motion (DIRECTV'S NTC OF MTN & MTN TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

08/29/2011 Memorandum Other (MEMO OF Ps&As ISO DIRECTV'S MTN TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

08/26/2011 Notice (OF RECENT AUTHORITY IN SUPPORT OF MOTION TO DISMISS)
Filed by Attorney for Defendant/Respondent

08/22/2011 Proof of Service
Filed by Attorney for Defendant/Respondent

08/22/2011 Reply/Response (IN SUPPORT OF MOTION TO DECERTIFY CLASS)
Filed by Attorney for Defendant/Respondent

08/22/2011 Reply/Response (IN SUPPORT OF MOTION TO DISMISS)
Filed by Attorney for Defendant/Respondent

08/17/2011 Stipulation and Order (RE SEALING OF DOCUMENTS FILED WITH THE DECLARATION OF PAUL D. STEVENS)
Filed by Attorney for Plaintiff/Petitioner

08/16/2011 Proof of Service
Filed by Attorney for Defendant/Respondent

08/05/2011 Proof of Service (PROOF OF SERVICE OF OPP TO MTN TO DISMISS, OPP TO MTN TO DECERTIFY, DECL OF ANDREW OGILVIE, GARY S. SOTER, JOHN W. HANSON & PAUL STEVENS)
Filed by Attorney for Plaintiff/Petitioner

08/05/2011 Declaration (DECL OF PAUL D. STEVENS, ESQ. ISO PLNTFFS' OPP TO DEFT'S MTN TO COMPEL ARBITRATION ********** DOCUMENT ORDERED LODGED UNDER SEAL ON 8-17-11 PENDING MOTION TO SEAL)
Filed by Attorney for Plaintiff/Petitioner

08/05/2011 Declaration (DECL OF ANDREW OGILVIE, ESQ. ISO OPP TO THE MTN FOR STAY)
Filed by Attorney for Plaintiff/Petitioner

08/05/2011 Opposition Document (PLNTFFS' OPP TO DEFT'S MTN TO DISMISS OR STAY PROCEEDINGS PENDING ARBITRATION & TO COMPEL ARBITRATION ** DOCUMENT ORDERED LODGED UNDER ** SEAL 8-23-11 PENDING MTN. TO SEAL)
Filed by Attorney for Plaintiff/Petitioner

08/05/2011 Declaration (DECL OF JOHN W. HANSON ISO PLNTFFS' OPP TO DEFT'S MTN TO COMPEL ARBITRATION)
Filed by Attorney for Plaintiff/Petitioner

08/05/2011 Opposition Document (PLNTFFS' OPP TO DEFT'S MTN TO DECERTIFY)
Filed by Attorney for Plaintiff/Petitioner

08/05/2011 Declaration (DECL OF GARY S. SOTER ISO PLNTFFS' OPP TO DEFT'S MTN TO DISMISS)
Filed by Attorney for Plaintiff/Petitioner

07/28/2011 Order (GRANTING PLAINTIFFS' REQUEST FOR FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET FOUR)
Filed by Attorney for Plaintiff/Petitioner

07/20/2011 Notice (NTC OF ORDER RE: STIPULATION)
Filed by Attorney for Plaintiff/Petitioner

07/19/2011 Stipulation and Order (RE DEFENDANT'S MOTIONS TO COMPEL ARBITRATION AND DECERTIFY)
Filed by Attorney for Plaintiff/Petitioner

06/17/2011 Order (GRANTING DIRECTV'S MOTION TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

06/16/2011 Notice (NTC OF RECENT DEVELOPMENTS IN CELLPHONE)
Filed by Attorney for Plaintiff/Petitioner

06/10/2011 Notice (NTC OF SUBMISSION OF PROPOSED ORDER ON DIRECTV'S MTN TO SEAL, IN ACCORDANCE WITH MAY 18, 2011 RULING)
Filed by Attorney for Defendant/Respondent

06/10/2011 Proof of Service (PROOF OF SERVICE OF NTC OF SUBM., PROPOSED ORDER, PROOF OF SERVICE)
Filed by Attorney for Defendant/Respondent

05/20/2011 Notice (of MAY 18, 2011 HEARING)
Filed by Attorney for Defendant/Respondent

05/17/2011 Memorandum - Other (MEMO OF Ps&As ISO MTN TO DECERTIFY CLASS)
Filed by Attorney for Defendant/Respondent

05/17/2011 Declaration (DECL OF VALERIE W. MCCARTHY FILED ISO DIRECTV'S MTN TO COMPEL ARBITRAITON [*sic*])
Filed by Attorney for Defendant/Respondent

05/17/2011 Miscellaneous Other (PLNTFFS' STATEMENT RE: PROPOSED CLASS NOTICE)
Filed by Attorney for Plaintiff/Petitioner

05/17/2011 Motion (MTN TO DECERTIFY CLASS)
Filed by Attorney for Defendant/Respondent

05/17/2011 Motion (MTN TO DISMISS OR STAY PROCEEDINGS PENDING ARBITRATION & TO COMPEL ARBITRATION)
Filed by Attorney for Defendant/Respondent

05/17/2011 Declaration (DECL OF SHAUN PAISLEY ISO DEFT'S MTN TO DECERTIFY CLASS & MTN TO DISMISS OR STAY)
Filed by Attorney for Defendant/Respondent

05/17/2011 Memorandum Other (MEMO OF Ps&As ISO DIRECTV'S MTN TO DISMISS OR STAY & TO COMPEL ARBITRATION)
Filed by Attorney for Defendant/Respondent

05/17/2011 Proof of Service (PROOF OF SERVICE OF MTNS TO DISMISS OR STAY & MTN TO DECERTIFY CLASS AND SUPPORTING DOCUMENTS)
Filed by Attorney for Defendant/Respondent

05/17/2011 Report-Status (PLNTFFS' STATUS CONFERENCE STATEMENT)
Filed by Attorney for Plaintiff/Petitioner

05/12/2011 Notice of Ruling
Filed by Attorney for Defendant/Respondent

05/11/2011 Reply/Response (REPLY ISO DIRECTV'S MTN TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

05/10/2011 Order (GRANTING APPLICATION OF STEVEN M. SPRENGER TO APPEAR AS COUNSEL PRO HAC VICE **NO RETURN COPY SUBMITTED**)
Filed by Attorney for Plaintiff/Petitioner

05/09/2011 Order (AMENDED ORDER RE: CLASS CERTIFICATION)
Filed by Clerk

05/05/2011 Opposition Document (PLNTFFS' OPP TO DEFT'S MTN TO SEAL DOCUMENTS)
Filed by Attorney for Plaintiff/Petitioner

05/04/2011 Notice (NTC OF SUPPLEMENTAL EVIDENCE ISO DIRECTV'S MTN TO SEAL)
Filed by Attorney for Defendant/Respondent

05/04/2011 Report-Status (DIRECTV'S STATUS CONFERENCE STATEMENT)
Filed by Attorney for Defendant/Respondent

05/04/2011 Request (REQ. FOR CORRECTION OF CLERICAL ERROR IN APRIL 20, 2011 CLASS CERT ORDER)
Filed by Attorney for Defendant/Respondent

04/25/2011 Notice (RE: NOTICE OF RULING)
Filed by Attorney for Plaintiff/Petitioner

04/22/2011 Notice of Ruling (NTC OF RULING RE: CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

04/22/2011 Notice (NTC OF WITHDRAWAL OF BRYCE M, MILLER AS CNSL FOR PLNTFF AMY IMBURGIA & MARLENE MECCA)
Filed by Attorney for Plaintiff/Petitioner

04/22/2011 Application-Miscellaneous (NTC OF & APPL OF STEVEN M. SPENGER [*sic*] TO APPEAR PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

04/20/2011 Order (RE: CLASS CERTIFICATION)
Filed by Clerk

04/15/2011 Notice (NTC OF RECENT DEVELOPMENTS IN CELLPHONE)
Filed by Attorney for Defendant/Respondent

04/08/2011 Notice (NTC OF 4/6/11 HRGX)
Filed by Attorney for Defendant/Respondent

04/05/2011 Proof of Service
Filed by Attorney for Defendant/Respondent

04/05/2011 Declaration (DECL OF BLADOW ISO DIRECTV'S STATEMENT)
Filed by Attorney for Defendant/Respondent

04/05/2011 Miscellaneous-Other (DIRECTV'S STATEMENT RE: PLNTFFS' RESPONSE TO DIRECTV'S OBJ TO PLNTFFS' TEN-PAGES-TOO-LONG REPLY)
Filed by Attorney for Defendant/Respondent

03/30/2011 Objection Document (PLNTFFS' OBJ TO DEFT'S NTC OF SUPPLEMENTAL EVIDENCE ISO ITS OPP TO MTN FORCLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

03/30/2011 Response (PLNTFFS' RESPONSE TO DIRECTV'S OBJ TO PAGE LENGTH OF PLNTFFS' REPLY BRIEF ISO MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

03/30/2011 Objection Document (PLNTFFS' OBJ TO DEFT'S STC STATEMENT)
Filed by Attorney for Plaintiff/Petitioner

03/29/2011 Objection Document (DIRECTV'S OBJ TO PLNTFF'S UNAUTHORIED [*sic*], 10-PAGES-TOO-LONG REPLY BRIEF ISO MTN FOR CLASS CERT)
Filed by Attorney for Defendant/Respondent

03/29/2011 Report-Status (DIRECTV'S STATUS CONFERENCE STATEMENT)
Filed by Attorney for Defendant/Respondent

03/29/2011 Proof of Service
Filed by Attorney for Defendant/Respondent

03/29/2011 Objection Document (DIRECTV'S OBJ. TO THE FELLMETH & EVANS DECL SUBMITTED WITH PLNTFF'S REPLY ISO MTN FOR CLASS CERT)
Filed by Attorney for Defendant/Respondent

03/29/2011 Brief-Supplemental (DIRECTV'S SUPPLEMENTAL BRIEF ADDRESSING EFFECT OF CELLPHONE)
Filed by Attorney for Defendant/Respondent

03/29/2011 Notice (NTC OF SUPPL. EVIDENCE ISO DIRECTV'S OPP TO PLNTFFS' MTN FOR CLASS CERT)
Filed by Attorney for Defendant/Respondent

03/29/2011 Brief-Supplemental (SUPPL. BRIEF ISO PLNTFFS' OPP TO DEFT'S MTN FOR JUDGMENT ON THE PLEADINGS & PLNTFFS' MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

03/15/2011 Stipulation and Order (CONTINUING HRG. DATES FOR PLTFS. MTN. FOR CLASS CERTIFICATION AND DEFTS. MTN. FOR JUDGMENT ON THE PLEADINGS, & SETTING SUPPLEMENTAL BRIEFING SCHEDULE)
Filed by Attorney for Defendant/Respondent

03/07/2011 Stipulation and Order (TO CONTINUE HRG. DATES)
Filed by Attorney for Plaintiff/Petitioner

03/01/2011 Reply/Response (REPLY ISO DIRECTV'S MTN FOR JUDGMENT ON THE PLEADINGS)
Filed by Attorney for Defendant/Respondent

02/24/2011 Declaration (DECL OF INGRID M. EVANS, ESQ,)
Filed by Attorney for Plaintiff/Petitioner

02/24/2011 Reply/Response (PLNTFFS' REPLY ISO MTN FOR CLASS CERT & APPOINTMENT OF CLASS CNSL)
Filed by Attorney for Plaintiff/Petitioner

02/24/2011 Declaration (DECL OF RYAN J. CLARKSON ISO PLNTFFS' OPP TO DEFT'S MTN FOR JUDGMENT ON THE PLEADINGS)
Filed by Attorney for Plaintiff/Petitioner

02/24/2011 Objection Document (PLNTFFS' OBJ TO EVIDENCE SUBMITTED BY DEFT ISO ITS OPP TO MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

02/24/2011 Opposition Document (PLNTFFS' OPP TO DEFT'S MTN FOR JUDGMENT ON THE PLEADINGS)
Filed by Attorney for Plaintiff/Petitioner

02/24/2011 Declaration (DECL OF ROBERT C. FELLMETH)
Filed by Attorney for Plaintiff/Petitioner

02/24/2011 Proof of Service
Filed by Attorney for Plaintiff/Petitioner

02/24/2011 Declaration (DECL OF PAUL D. STEVENS, ESQ.)
Filed by Attorney for Plaintiff/Petitioner

02/09/2011 Proof of Service (PROOF OF SERVICE OF OPP. & DECL)
Filed by Attorney for Defendant/Respondent

02/09/2011 Declaration (DECL OF ROBYN BLADOW ISO DIRECTV'S OPP TO PLNTFFS' EX PARTE APPL.)
Filed by Attorney for Defendant/Respondent

02/09/2011 Opposition Document (DIRECTV'S OPP TO PLNTFFS' EX PARTE APPL.)
Filed by Attorney for Defendant/Respondent

02/08/2011 Ex-Parte Application (PLNTFFS' EX PARTE APPL. FOR COMPLIANCE WITH COURT ORDERED BRIEFING SCHEDULE)
Filed by Attorney for Plaintiff/Petitioner

02/04/2011 Amended Proof of Service
Filed by Attorney for Defendant/Respondent

02/04/2011 Notice of Lodging (NTC OF LODGING OF AUDIO RECORDINGS OF EXHIBITS 13-23)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF GILBERT A. CALLO IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF DYAN DECKER FILED IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS' MO.FOR CLASS CERT.)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF VALERIE W. MCCARTHY FILED IN SUPPORT OF DIRECTV'S

OPPOSITION TO PLAINTIFFS' MO. FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF JOSE CARDENAS IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF ANNALISA PETERSON IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS' MO. FOR CLASS CERT.)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF JAIME SICHLER FILED IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS' MO. FOR CLASS CERT.)
Filed by Attorney for Defendant/Respondent

02/03/2011 Proof of Service
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF TED OFFERMAN IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Notice of Motion (FOR JUDGMENT ON THE PLEADINGS)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF ROBERT KNUDSEN IN SUPPORT OF DIRECTV'S OPPOSITION TO

PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF SHERRY KANG IN SUPPORT OF DIRECTV'S OPPOSITIOHN [*sic*] TO PLAINTIFFS' MO. FOR CLASS CERT.)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF DOUG EICHLER FILED IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS' MO. FOR CLASS CERT.)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF DIRECTV SUBSCRIBERS' IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Objection Document (TO EVIDENCE SUBMITTED IN THE EVANS DECLARATION IN SUPPORT OF MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Points and Authorities
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF ROGER GARVIN IN SUPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (ANNALISA PETERSON IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF CAITLIN BAILING IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF COREY L. SAVORY IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Opposition Document (TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

02/03/2011 Declaration (OF ALISON BALE FILED IN SUPPORT OF DIRECTV'S OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

01/21/2011 Order (GRANTING APPLICATION OF BRYCE M. MILLER TO APPEAR AS COUNSEL PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

01/19/2011 Partial Dismissal (w/o Prejudice) (AS TO PLAINTIFF MARLENE MECCA ONLY WITHOUT PREJUDICE)
Filed by Attorney for Plaintiff/Petitioner

01/19/2011 Stipulation and Order (FOR REQUEST FOR DISMISSAL OF MARLENE MECCA WITHOUT PREJUDICE)
Filed by Attorney for Plaintiff/Petitioner

01/10/2011 Notice (PLNTFFS' NTC OF WITHDRAWAL WITHOUT PREJUDICE OF MTN TO COMPEL DEPO OF MIKE KRENICK AND SHANNON CAMPAIN (DTV'S DESIGNATED PERSONS MOST QUALIFIED) AND KERRIE DOWNEY)
Filed by Attorney for Plaintiff/Petitioner

01/07/2011 Notice-Change-Firm Name/Address (AS TO MILSTEIN, ADELMAN & KREGER, LLP RE: BC398431 (GREINER))
Filed by Attorney for Plaintiff/Petitioner

01/06/2011 Substitution of Attorney (AS TO INGRID M. EVANS & THE EVANS LAW FIRM IN PLACE OF WATERS KRAUS & PAUL)
Filed by Attorney for Plaintiff/Petitioner

12/27/2010 Application-Miscellaneous (NTC & APPL OF BRYCE M. MILLER TO APPEAR PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

12/17/2010 Declaration (DECL OF ROBYN BLADOW ISO EX PARTE APPL)
Filed by Attorney for Defendant/Respondent

12/17/2010 Order (GRANTING DIRECTV'S EX PART REQUEST FOR MODIFICATION OF BRIEFING SCHEDULE FOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION)
Filed by Attorney for Defendant/Respondent

12/17/2010 Ex-Parte Application (EX PARTE APPL FOR MODIFICATION OF BRIEFING SCHEDULE)
Filed by Attorney for Defendant/Respondent

12/17/2010 Proof of Service (OF EX PARTE APPL)
Filed by Attorney for Defendant/Respondent

12/13/2010 Motion to Compel (MTN TO COMPEL DEPO OF MIKE KRENK & SHANNON CAMPAIN)
Filed by Attorney for Plaintiff/Petitioner

12/13/2010 Memorandum - Other (MEMO OF Ps&As ISO PLNTFFS' MTN TO COMPEL DEPO OF MIKE KRENK & SHANNON CAMPAIN)
Filed by Attorney for Plaintiff/Petitioner

12/13/2010 Declaration (DECL OF INGRID M. EVANS ISO MTN TO COMPEL DEPOS)
Filed by Attorney for Plaintiff/Petitioner

12/09/2010 Notice (NTC OF ERRATA RE PLNTFFS' STATUS CONFERENCE STATEMENT)
Filed by Attorney for Plaintiff/Petitioner

12/08/2010 Proof of Service
Filed by Attorney for Defendant/Respondent

12/08/2010 Report-Status (DIRECTV'S STATUS CONFERENCE STATEMENT)
Filed by Attorney for Defendant/Respondent

12/08/2010 Report-Status (PLNTFFS' STATUS CONFERENCE STATEMENT)
Filed by Attorney for Plaintiff/Petitioner

12/08/2010 Declaration (DECL OF SHAUN PAISLEY FILED IN CONJUCTION [*sic*] WITH DIRECTV'S STC STATEMENT)
Filed by Attorney for Defendant/Respondent

12/01/2010 Declaration (DECL OF SHAUN PAISLEY ISO DIRECTV'S MTN TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

12/01/2010 Motion (DIRECTV'S NTC OF MTN & MTN TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

12/01/2010 Proof of Service
Filed by Attorney for Defendant/Respondent

12/01/2010 Memorandum - Other (MEMO OF Ps&As ISO DIRECTV'S MTN TO SEAL DOCUMENTS)
Filed by Attorney for Defendant/Respondent

11/19/2010 Notice (PLNTFF'S NTC OF INTENT TO LODGE "CONDITIONALLY UNDER SEAL" MATERIAL PRODUCED IN DISCOVERY &

DESIGNATED CONFIDENTIAL BY OTHER PARTY)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Proof of Service
(MTN FORCLASS CERT, ETC)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Declaration (DECL OF PAMELA PRESSLEY ISO MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Declaration (DECL OF RYAN J. CLARKSON ISO MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Declaration (DECL OF F. EDIE MERMELSTEIN ISO MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Memorandum Other (PLNTFFS' MEMO OF Ps&As ISO MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Declaration (DECL OF INGRID M. EVANS ISO MTN FOR CLASS CERT [REDACTED])
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Declaration (DECL OF PAUL D. STEVENS ISO MTN FOR CLASS CERT)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Motion (MTN FOR CLASS CERT & FOR APPNTMNT OF CLASS CNSL)
Filed by Attorney for Plaintiff/Petitioner

11/19/2010 Request for Judicial Notice Filed by Attorney for Plaintiff/Petitioner

09/20/2010 Stipulation and Order (CONTINUING CLASS CERTIFICATION AND DISCOVERY DEADLINES)
Filed by Attorney for Plaintiff/Petitioner

08/02/2010 Proof of Service (ON ORDER CONTINUING CLASS CERTIFICATION AND DISCOVERY DEADLINES)
Filed by Attorney for Plaintiff/Petitioner

08/02/2010 Notice (OF UNAVAILABILITY OF PLAINTIFFS' COUNSEL)
Filed by Attorney for Plaintiff/Petitioner

07/22/2010 Stipulation and Order (CONTINUING CLASS CERTIFICATION AND DISCOVERY DEADLINES)
Filed by Attorney for Plaintiff/Petitioner

04/01/2010 Notice (NTC OF ENTRY OF STIPULATED PROTECTIVE ORDER)
Filed by Attorney for Defendant/Respondent

03/25/2010 Stipulation and Order (RE: PROTECTIVE ORDER)
Filed by Attorney for Plaintiff/Petitioner

03/15/2010 Response (RESPONSE TO NON-PARTY FEDERAL COURT PLNTFFS' EX PARTE APPL.)
Filed by Attorney for Defendant/Respondent

03/12/2010 Ex-Parte Application (FOR ORDER STAYING DEPO)
Filed by Attorney for Plaintiff/Petitioner

03/12/2010 Response (PRELIMINARY RESPONSE TO FEDERAL COURT PLNTFF)
Filed by Attorney for Defendant/Respondent

03/12/2010 Notice (NTC OF INTENT TO APPEAR BY TELEPHONE)
Filed by Attorney for Defendant/Respondent

02/16/2010 Answer to First Amended Complaint (DIRECTV'S ANS TO PLNTFFS' 1ST AMENDED CLASS ACTION COMPLAINT)
Filed by Attorney for Defendant/Respondent

02/08/2010 Opposition Document (PLNTFFS' OPP TO DEFT'S NTC OF WITHDRAWAL OF DEM)
Filed by Attorney for Plaintiff/Petitioner

02/04/2010 Report-Status (PLNTFFS' STATUS CONFERENCE STATEMENT)
Filed by Attorney for Plaintiff/Petitioner

02/04/2010 Proof of Service (PLNTFFS' STATUS CONFERENCE STATEMENT & PROOF OF SERVICE)
Filed by Attorney for Plaintiff/Petitioner

02/04/2010 Report-Status (REPORT RE CONFERENCE IN MULTIDISTRICT LITIGATION & NTC OF WITHDRAWAL OF DEM.)
Filed by Attorney for Defendant/Respondent

01/19/2010 Miscellaneous-Other (STATEMENT REGARDING STATUS OF RELATED FEDERAL PROCEEDINGS)
Filed by Attorney for Defendant/Respondent

12/21/2009 Notice of Change of Address (FOR WATERS, KRAUS & PAUL)
Filed by Attorney for Plaintiff/Petitioner

12/15/2009 Notice of Change of Address (OF CNSL FOR DEFT DIRECTV, INC.)
Filed by Attorney for Defendant/Respondent

11/16/2009 Reply/Response (PLNTFFS' REPLY TO DEFT'S OPP TO MTN FOR PREL INJUNCTION)
Filed by Attorney for Plaintiff/Petitioner

11/16/2009 Response (PLNTFFS' RESPONSE TO DIRECTV'S EVIDENTIARY OBJ. TO DECLARATIONS FILED ISO PLNTFFS' MTN FOR PRELIM INJUNCTION)
Filed by Attorney for Plaintiff/Petitioner

11/16/2009 Declaration (OF SHAUN PAISLEY ISO DIRECTV'S RENEWED MTN TO STAY)
Filed by Attorney for Defendant/Respondent

11/16/2009 Objection Document (PLNTFFS' EVIDENTIARY OBJ. TO DECL. FILED INSO

DEFT'S OPP TO MTN FOR PRELIMINARY INJUNCTION)
Filed by Attorney for Plaintiff/Petitioner

11/16/2009 Reply/Response (ISO DIRECTV'S RENEWED MTN TO STAY PENDING THE CONCLUSION OF FEDERAL MULTIDISTRICT LITIGATION)
Filed by Attorney for Defendant/Respondent

11/16/2009 Proof of Service (OF REPLY TO OPP TO MTN FOR PRELIM INJUNCTION; EVIDENTIARY OBJ. TO DECLARATIONS; RESPONSE TO EVIDENTIARY OBJ.; PROOF OF SERVICE)
Filed by Attorney for Plaintiff/Petitioner

11/13/2009 Order (GRANTING APPLICATION OF WILLIAM M. SWEETNAM TO APPEAR AS COUNSEL PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

11/12/2009 Notice (OF WITHDRAWAL OF DANIEL C. BRYDEN)
Filed by Attorney for Plaintiff/Petitioner

11/09/2009 Declaration (OF KAREN K. LEEVER ISO DIRECTV'S OPP TO PLNTFFS' MTN FOR PRELIMINARY INJUNCTION)
Filed by Attorney for Defendant/Respondent

11/09/2009 Opposition Document (PLNTFFS' OPP TO DIRECT, INC.'S RENEWED MTN TO STAY)
Filed by Attorney for Plaintiff/Petitioner

11/09/2009 Objection Document (DIRECTV'S EVIDENTIARY OBJECTIONS TO DECL OF MARY COX, RAUL FLORES, LETICIA CASTRO & KEVIN KUHLKEN)
Filed by Attorney for Defendant/Respondent

11/09/2009 Declaration (OF COREY L. PETTER ISO DIRECTV'S OPP TO PLNTFFS' MTN FOR PRELIM INJUNC)
Filed by Attorney for Defendant/Respondent

11/09/2009 Proof of Service (OF OPP, DECL, PROOF OF SERVICE AND PROPOSED ORDER)
Filed by Attorney for Plaintiff/Petitioner

11/09/2009 Declaration (OF HARVEY ROSENFIELD ISO PLNTFFS' OPP TO RENEWED MTN TO STAY)
Filed by Attorney for Plaintiff/Petitioner

11/09/2009 Declaration (OF GARY QUALLS ISO DIRECTV'S OPP TO PLNTFFS' MTN FOR PRELIM INJUNC)
Filed by Attorney for Defendant/Respondent

11/09/2009 Proof of Service (OPP, EVIDENTIARY OBJECTIONS, DECLARATIONS, COMPENDIUM OF NON-CALIFORNIA & ELECTRONICALLY-PUBLISHED AUTHORITIES, AND PROOF OF SERVICE)
Filed by Attorney for Defendant/Respondent

11/09/2009 Opposition Document (TO PLNTFFS' MTN FOR PRLIMINARY [*sic*] INJUNCTION)
Filed by Attorney for Defendant/Respondent

11/09/2009 Declaration (OF CHRISTOPHER A. MURPHY ISO DIRECTV'S OPP TO PLNTFFS' MTN FOR PRELIMINARY INJUNCTION)
Filed by Attorney for Defendant/Respondent

11/09/2009 Declaration (OF ROGER GARVIN FILED ISO DIRECTV'S OPP TO PLNTFFS' MTN FOR PRELIMINARY INJUNCTION)
Filed by Attorney for Defendant/Respondent

11/09/2009 Declaration (OF VALERIE W. MCCARTHY ISO DIRECTV'S OPP TO PLNTFFS' MTN FOR PRELIMINARY INJUNCTION)
Filed by Attorney for Defendant/Respondent

10/22/2009 Response (TO PLNTFFS' EX PARTE APPL)
Filed by Attorney for Defendant/Respondent

10/22/2009 Ex-Parte Application (TO SET DEFENDANT'S RENEWED MTN FOR STAY FOR HRG ON 11/24/09 & FOR ADDITIONAL TIME TO OPPOSE)
Filed by Attorney for Plaintiff/Petitioner

10/20/2009 Report-Status (DIRECTV'S STATUS CONFERENCE STATEMENT)
Filed by Attorney for Defendant/Respondent

10/20/2009 Report-Status (PLNTFFS' CMC STATEMENT)
Filed by Attorney for Plaintiff/Petitioner

10/14/2009 Declaration (OF ROBYN BLADOW ISO DIRECTV'S RENEWED MTN TO STAY)
Filed by Attorney for Defendant/Respondent

10/14/2009 Reply/Response (ISO DIRECTV'S DEM)
Filed by Attorney for Defendant/Respondent

10/14/2009 Notice (OF RENEWED MTN TO STAY)
Filed by Attorney for Defendant/Respondent

10/14/2009 Motion (RENEWED MTN TO STAY PENDING THE CONCLUSION OF FEDERAL MULTIDISTRICT PROCEEDINGS)
Filed by Attorney for Defendant/Respondent

10/14/2009 Proof of Service
Filed by Attorney for Defendant/Respondent

10/14/2009 Stipulation and Order (AMENDING HRG. DATE ON PLTFS. MTN. FOR PRELIMINARY INJUNCTION)
Filed by Attorney for Defendant/Respondent

10/13/2009 Notice
Filed by Attorney for Plaintiff/Petitioner

10/13/2009 Proof of Service
Filed by Attorney for Plaintiff/Petitioner

10/08/2009 Proof of Service
Filed by Attorney for Plaintiff/Petitioner

10/07/2009 Points and Authorities (PLNTFFS' MEMO OF Ps&As IN OPP TO DEF. DIRECTV,

INC.'S DEM. TO THE 1ST AMENDED COMPLAINT)
Filed by Attorney for Plaintiff/Petitioner

10/02/2009 Substitution of Attorney (NOTCE [*sic*] OF, AS TO DAVID L. CHANG)
Filed by Attorney for Plaintiff/Petitioner

09/28/2009 Notice (OF AMENDMENT TO DEM TO FAC)
Filed by Attorney for Defendant/Respondent

09/21/2009 Proof of Service (MTN FOR PRELIM INJUNC; DECLARATION; PROPOSED ORDER; APPENDIX;)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF PLAINTIFF KATHY GREINER ISO MTN FOR PRELIM INJUNC.)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Motion (FOR PRELIMINARY INJUNCTION)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF JENNIFER STEINBERG ISO MTN FOR PRELIM INJUNC)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF PLAINTIFF MARLENE MECCA ISO MTN FOR PRELIM INJUNC.)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF PLAINTIFF AMY IMBURGIA ISO MTN FOR PRELIM INJUNC.)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Points and Authorities (MEMO OF Ps&As ISO MTN FOR PRELIM INJUNC,)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF PUTATIVE CLASS MEMBER MARY COX ISO MTN FOR PRELIM INJUNC.)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF NON-PARTY LETICIA CASTRO ISO MTN FOR PRELIM INJUNC.)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF PUTATIVE CLASS MEMBER RAUL FLORES ISO MTN FOR PRELIM INJUNC.)
Filed by Attorney for Plaintiff/Petitioner

09/21/2009 Declaration (OF PUTATIVE CLASS MEMBER KEVIN KUHLKEN ISO MTN FOR PRELIM INJUNC.)
Filed by Attorney for Plaintiff/Petitioner

09/18/2009 Demurrer (TO FAC)
Filed by Attorney for Defendant/Respondent

09/18/2009 Points and Authorities (MEMO OF Ps&As ISO DEM)
Filed by Attorney for Defendant/Respondent

09/18/2009 Proof of Service (OF DEM; MEMO OF Ps&As; COMPENDIUM OF NON-CALIFORNIA AUTHORITIES; PROPOSED ORDER; PROOF OF SERVICE)
Filed by Attorney for Defendant/Respondent

07/09/2009 Notice (re status of first-filed Federal Proceedings)
Filed by Attorney for Defendant/Respondent

03/17/2009 Proof of Service (OF FIRST AMENDED CLASS ACTION COMPLAINT)
Filed by Attorney for Plaintiff/Petitioner

03/16/2009 First Amended Complaint
Filed by Attorney for Plaintiff/Petitioner

02/06/2009 Reply/Response (ISO DIRECTV, INC'S MTN TO STAY PENDING THE CONCLUSION OF FIRST FILED FEDERAL PROCEEDINGS)
Filed by Attorney for Defendant/Respondent

02/06/2009 Supplemental Declaration (OF ROBYN E. BLADOW ISO DIRECTV, INC.'S MTN TO STAY)
Filed by Attorney for Defendant/Respondent

02/05/2009 Order (GRANTING APPLICATION OF GARRETT W. WOTKYNS TO APPEAR AS COUNSEL PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

02/02/2009 Declaration (OF LAUNA N, EVERMAN ISO PLNTFFS' OPP. TO MTN TO STAY)
Filed by Attorney for Plaintiff/Petitioner

02/02/2009 Opposition Document (TO DIRECTV, INC'S MTN TO STAY)
Filed by Attorney for Plaintiff/Petitioner

01/22/2009 Declaration (OF ROBYN E. BLADOW ISO MTN TO STAY)
Filed by Attorney for Defendant/Respondent

01/20/2009 Memorandum Other (ISO DIRECTV, INC.'S MTN TO STAY PENDING THE CONCLUSION OF FIRST FILED FEDERAL PROCEEDINGS)
Filed by Attorney for Defendant/Respondent

01/20/2009 Motion (TO STAY PENDING CONCLUSION OF FIRS-FILED FEDERAL PROCEEDINGS)
Filed by Attorney for Defendant/Respondent

01/09/2009 Application-Miscellaneous (OF GARRETT W. WOTKYNS TO APPEAR PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

01/09/2009 Proof of Service (APPL, FOR PRO HAC VICE & PROPOSED ORDER)
Filed by Attorney for Plaintiff/Petitioner

01/02/2009 Miscellaneous-Other (JOINT INITIAL STATUS CONFERENCE REPORT)
Filed by joined Party

12/16/2008 Notice (OF APPEARNCE [*sic*] FOR COUNSEL OF DIRECTV, INC.)
Filed by Attorney for Defendant/Respondent

12/09/2008 Order (GRANTING APPLICATION OF DANIEL BRYDEN TO APPEAR AS COUNSEL PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

12/09/2008 Order (GRANTING APPLICATION OF DEANNA DAILEY TO APPEAR AS COUNSEL PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

12/02/2008 Order (INITIAL STATUS CONFERENCE ORDER)
Filed by Clerk

12/02/2008 Notice (OF APPEARANCE)
Filed by Attorney for Plaintiff/Petitioner

11/19/2008 Declaration (AMENDED DECL. OF DANIEL BRYDEN TO APPEAR PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

11/19/2008 Declaration (AMENDED DECL. OF DEANN DAILEY TO APPEAR PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

11/19/2008 Proof of Service (AMENDED DECLARATIONS)
Filed by Attorney for Plaintiff/Petitioner

11/13/2008 Notice (OF ORDER RE: REASSIGNMENT OF MATTERS TO THE HON. EMILIE H. ELIAS)
Filed by Attorney for Defendant/Respondent

11/05/2008 Notice (of order granting peremptory challenge and transferring cases for reassignment)
Filed by Attorney for Deft/Respnt

10/29/2008 Application-Miscellaneous (OF DEANNA DAILEY TO APPEAR AS COUNSEL PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

10/29/2008 Application-Miscellaneous (OF DANIEL BRYDEN TO APPEAR AS COUNSEL PRO HAC VICE)
Filed by Attorney for Plaintiff/Petitioner

10/29/2008 Proof of Service (OF APPLICATION FOR PRO HAC VICE OF DEANNA DAILEY & DANIEL BRYDEN)
Filed by Attorney for Plaintiff/Petitioner

10/24/2008 CCP 170.6 Application Filed (DIRECTV'S MOTION TO DISQUALIFY PURSUANT TO CAL. CIV. PROC. CODE 170.6; AFFIDAVIT OF PREJUDICE)
Filed by Attorney for Defendant/Respondent

10/23/2008 Proof of Service
Filed by Attorney for Plaintiff/Petitioner

10/23/2008 Declaration (OF JOSHUA G. KONECKY REGARDING VENUE FOR CONSUMER LEGAL REMEDIES ACT)
Filed by Attorney for Plaintiff/Petitioner

10/06/2008 Proof of Service (OF SUMMONS)
Filed by Attorney for Plaintiff/Petitioner

09/17/2008 Complaint

Proceedings Held

02/27/2012 at 08:30 am in Department 311, JOHN SHEPARD WILEY JR, Presiding Non-Appearance (Case Review) **Completed**

01/26/2012 at 08:30 am in Department 311, JOHN SHEPARD WILEY JR, Presiding Motion to Compel **Denied**

12/15/2011 at 11:00 am in Department 311, JOHN SHEPARD WILEY JR, Presiding Telephonic Conference **Completed**

12/01/2011 in Department 324, Emilie H. Elias, Presiding Order Re: Reassignment of Case **Completed**

11/18/2011 at 09:00 am in Department 324, Emilie H. Elias, Presiding Non-Appearance (Case Review) (RE MTN. TO DECERTIFY AND MTN. TO DISMISS OR STAY PROCEEDING SPENDING ARBITRATION) **Completed**

10/12/2011 at 09:00 am in Department 324, Emilie H. Elias, Presiding Motion (MTN TO SEAL DOCUMENTS) - **Granted**

08/31/2011 at 10:00 am in Department 324, Emilie H. Elias, Presiding Motion to Dismiss (ARBITRATION, MTN, TO DECERTIFY & STC

PER CRTS OWN MTN STC C/F 8/8/11) **Held-Continued**

07/13/2011 in Department 324, Emilie H. Elias, Presiding Telephonic Conference - **Completed**

06/10/2011 at 09:00 am in Department 324, Emilie H, Elias, Presiding Non-Appearance (Case Review) (RE MOTION TO SEAL**COURT DARK THIS DATE**ORDER SIGNED ON 6-17- 11)-**Not held**

05/18/2011 at 10:00 am in Department 324, Emilie H. Elias, Presiding Status Conference (& MTN TO SEAL DOCUMENTS) - **Held-Continued**

05/09/2011 in Department 324, Emilie H, Elias, Presiding Court Order - **Completed**

04/20/2011 in Department 324, Emilie H. Elias, Presiding Ruling on Submitted Matter - **Completed**

4/06/2011 at 02:30 pm in Department 324, Emilie H. Elias, Presiding Status Conference (MTN, FOR CLASS CERT. AND MTN. FOR JUDGMENT ON THE PLEADINGS) **Completed**

03/08/2011 at 01:45 pm in Department 324, Emilie H. Elias, Presiding Status Conference (MTN. FOR CLASS CERT. AND MTN. FOR JUDGMENT ON THE PLEADINGS c/t 3-29-11 by stip & ord.) **Continued by Stipulation**

02/09/2011 at 08:30 am in Department 324, Emilie H, Elias, Presiding Ex parte proceeding (EX PARTE

APPL. FOR COMPLIANCE WITH COURT ORDER) **Denied**

12/17/2010 at 08:30 am in Department 324, Emilie H. Elias, Presiding Ex parte proceeding (EX PARTE APPL FOR MODIFICATION OF BRIEFING SCHEDULE) - **Granted**

12/15/2010 at 01:30 pm in Department 324, Emilie H. Elias, Presiding Status Conference (C/F 10-15-10 ADV TIME FROM 1:45 TO 1:30, MRS. BLADOW TO GIVE NTC) - **Completed**

03/15/2010 at 08:30 am in Department 324, Emilie H. Elias, Presiding Ex parte proceeding (EX PARTE APPL FOR ORDER STAYING DEPOSITION OF ABSENT CLASS MEMBERS) **Moot**

02/08/2010 at 10:00 am in Department 324, Emilie H, Elias, Presiding Status Conference **Completed**

11/24/2009 at 01:45 pm in Department 324, Emilie H, Elias, Presiding Motion (FOR PRELIMINARY INJUNCTION) **Completed**

10/22/2009 at 08:30 am in Department 324, Emilie H. Elias, Presiding Status Conference **Completed**

07/10/2009 at 01:45 pm in Department 324, Emilie H, Elias, Presiding Status Conference (& MTN. TO STAY) **Completed**

04/07/2009 at 10:00 am in Department 308, Emilie H. Elias, Presiding •Motion for Stay of Proceedings (TO STAY PROCEEDINGS) **Continued by Court**

03/23/2009 at 11:00 am in Department 308, Emilie H. Elias, Presiding Motion for Stay of Proceedings **Completed**

02/18/2009 at 01:45 pm in Department 308, Emilie H. Elias, Presiding Motion for Stay of Proceedings (C/T 3-23-09) **Continued by Court**

02/17/2009 in Department 308, Emilie H. Elias, Presiding Court Order - **Completed**

01/09/2009 at 01:45 pm in Department 308, Emilie H. Elias, Presiding Initial Status Conference **Completed**

12/02/2008 in Department 308, Emilie H. Elias, Presiding Court Order **Completed**

11/04/2008 at 08:30 am in Department 322, Peter D. Lichtman, Presiding Affidavit of Prejudice **Completed**

10/23/2008 in Department 322, Peter D. Lichtman, Presiding Court Order - **Completed**

09/29/2008 at 08:30 am in Department 324, VICTORIA CHANEY, Presiding Court Order **Court makes order**

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LOS ANGELES
SUPERIOR
COURT

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

AMY IMBURGIA and MARLENE MECCA, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

DIRECTV, INC.,

Defendant.

KATHY GREINER, on behalf of herself and all others similarly situated,

Plaintiff,

vs.

DIRECTV, INC.,

Defendant.

LEAD CASE NO. BC398295
Related Case: BC398431

REPLY IN SUPPORT OF DIRECTV, INC.'S MOTION TO STAY PENDING THE CONCLUSION OF FIRST-FILED FEDERAL PROCEEDINGS

Hearing:	02/18/2009
Judge:	Hon. Emilie H. Elias
Dept.:	308
Lead Comp. Filed:	09/17/2008
Greiner Comp. Filed:	09/18/2008
Trial date:	None

THIS DOCUMENT RELATES TO ALL ACTIONS

* * *

2. Granting a stay would not "dilute" rights or unreasonably delay resolution of California consumers' claims.

Plaintiffs try to cast this lawsuit not as a means to preserve Plaintiffs' counsel hopes of sharing in any judgment or settlement relating to DIRECTV's early cancellation fees, but as a way of preventing the consumer protection and class action laws in California from being "circumvent[ed]." *See* Pls.' Opp. at 9. According to Plaintiffs, DIRECTV is seeking to litigate only the federal action because it wishes to bog that action down in choice-of-law and arbitration motions so that consumers never get their day in court under California law. *See id.* at 8-10. Plaintiffs describe this motion as a "strategic attempt to forum shop and halt litigation in the jurisdiction with the most favorable consumer protection laws." *Id.* at 9.

This argument is inaccurate on several levels. The Customer Agreement between DIRECTV and its customers provides that the customer's home state laws will govern the relationship, and that any disputes will be resolved in individual arbitration if the customer's home state laws enforce the parties' arbitration agreement. Because California law would not enforce the arbitration agreement as between DIRECTV and California customers, DIRECTV has not sought and will not seek to arbitrate disputes with California customers. The federal action includes three California named plaintiffs who are asserting California law claims

against DIRECTV. DIRECTV has so far responded to two of the initial complaints brought by California-resident plaintiffs, Annette Kahaly and Maureen Van Meter, and it did not move to compel arbitration in either case. *See* Bladow Supp. Decl. ¶ 2. Regardless of what choice-of-law and arbitration arguments DIRECTV makes against non-California customers, therefore, DIRECTV will have to defend against California consumer protection claims in federal court brought by California plaintiffs on behalf of a putative class of California consumers that includes Plaintiffs and their own proposed class. Nowhere do Plaintiffs explain how it is that rights under California law will be "diluted" or "circumvented."

Second, the picture Plaintiffs paint of a federal action bogging down in appeals and taking years to resolve at the expense of California consumers' claims is not accurate. Even if appellate issues arise as to the applicability of choice-of-law or arbitration provisions to non-California consumers' claims, the three California plaintiffs may proceed in the interim on behalf of a California class. Indeed, the DIRECTV litigation that Plaintiffs cite to support their argument that federal proceedings will last many years demonstrates that there will be no such delay. It is true that in *Masters v. DIRECTV, Inc. et al.*, Case No. 08-00906 FMC (VBKx) (brought by a Montana plaintiff) and *Murphy v. DIRECTV, Inc. et al.*, Case No. 07-6465, FMC (VBKx) (brought by a Georgia plaintiff), there is an appeal pending on choice-of-law and arbitration issues in the Ninth Circuit. What Plaintiffs fail to mention is that there is a third related case before the same judge and brought by the same counsel as the *Murphy* and

Masters cases, *Welch v. DIRECTV, Inc. et al.*, Case No. CV 08-01558 FMC (VBKx) (C.D. Cal), in which a California customer brought the same claims, originally on behalf of a putative nationwide class. To avoid being subject to the stay applicable to the non-California plaintiffs, Welch agreed to proceed on behalf of a California-only class. *See* Bladow Supp. Decl. ¶ 6 & Ex. 8 *(Welch* Order). The *Welch* case is now proceeding through discovery, and class certification proceedings will occur this year. *See id.* ¶ 6.

Plaintiffs' suggestion that the initial pleading of a nationwide class binds the federal plaintiffs to a nationwide class for all time is wrong. *See* Pls.' Opp. at 10. Welch, for example, did not allege a California subclass in the alternative in her complaint. *See* Bladow Supp Decl. ¶ 5. And courts have recognized the flexibility that both they and the parties have in shaping appropriate subclasses regardless of the original proposed class definition. *See, e.g., Santillan v. Gonzales*, 388 F. Supp. 2d 1065, 1071-72 (N.D. Cal. 2005) (noting that "[a] court may divide a class into subclasses on motion of either party, or *sua sponte*"); *In Re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) (observing that "holding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition. District courts are permitted to limit or modify class definitions to provide the necessary precision"). Moreover, counsel for plaintiffs in the federal early cancellation fee litigation informed counsel for DIRECTV during a meet and confer that, if certain non-California plaintiffs are compelled to arbitration,

the remaining plaintiffs will proceed with a smaller putative class. *See* Bladow Supp. Decl. ¶ 3. In sum, there is no reason to conclude that the entire federal litigation would be stayed pending resolution of choice-of-law and arbitration issues as to out-of-state plaintiffs. And, if the federal early cancellation fee litigation does follow the same path as *Welch*, and California-resident plaintiffs proceed separately on behalf of a California-only putative class, then there is all the more reason for a stay here because the class definitions in the federal and state cases would not merely overlap; they would be identical.

* * *

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MAR 16 2009
LOS ANGELES
SUPERIOR COURT

CONSUMER WATCHDOG

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL DISTRICT

UNLIMITED JURISDICTION

AMY IMBURGIA, MARLENE MECCA, and KATHY GREINER, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

DIRECTV, INC., a California Corporation; and DOES 1-100, inclusive.

Defendants.

CASE NO. BC398295

FIRST AMENDED CLASS ACTION COMPLAINT FOR:

1. **Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*;**
2. **Unfair, Deceptive and Misleading Advertising, Cal. Bus. & Prof. Code § 17500;**
3. **Unlawful, Deceptive and Unfair Business Practices, Cal. Bus & Prof. Code § 17200;**
4. **Violation of Cal. Civ. Code § 1671(d);**
5. **Money Had And Received;**
6. **Unjust Enrichment; and**
7. **Declaratory Relief.**

JURY TRIAL DEMANDED

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INTRODUCTION

1. Plaintiffs bring this consumer class action against DIRECTV, Inc. and Does 1-100 (collectively "DIRECTV" or "Defendants"), a leading provider of satellite television services in California. DIRECTV engages in a uniform policy and practice of enforcing an alleged contractual obligation against its customers to purchase DIRECTV's services for a specified period of time, typically 18 or 24 months (the "term commitment"), by imposing an early cancellation penalty on its customers who discontinue receiving DIRECTV's services before the expiration of the alleged term commitment, even when, for example, the reason for cancellation is due to a problem with the service.

2. These early cancellation penalties are often as high as $480. DIRECTV withdraws the early cancellation penalties and other amounts allegedly due directly from the customers' bank accounts or credit cards, using account information provided by the customers when they first ordered DIRECTV, without consulting them or otherwise obtaining their consent. The early cancellation penalties bear no relation to the damage, if any, incurred by DIRECTV in connection with an early cancellation of the service. DIRECTV's primary intention in implementing and enforcing the penalty is to force customers to pay for its services for at least 18 months (and sometimes longer) and prevent customers from readily changing to another satellite or cable provider, even if they are no longer able to use DIRECTV's service due to faulty equipment or other reasons.

3. As set forth below, DIRECTV has no right, contractual or otherwise, to enforce the supposed term commitment or impose an early cancellation penalty against its customers by withdrawing funds directly from the customers' bank accounts or credit cards without their consent or otherwise. Plaintiffs and the Class members seek injunctive relief on behalf of all current and former DIRECTV customers who were charged or may be charged an early cancellation penalty and monetary relief on behalf of current and former DIRECTV customers who paid DIRECTV an early cancellation penalty; the imposition of constructive trusts on all monies by which DIRECTV was unjustly enriched as a result of collecting the early cancellation penalties and as a result of tethering Plaintiffs and the Class members to DIRECTV's arbitraryterms and conditions; and all such other and further relief to which they may be entitled to under the UCL, the CLRA, and common law, including, without limitation, restitution.

PARTIES

4. Plaintiff Amy Imburgia is a resident of Huntington Beach, California. Ms. Imburgia was a DIRECTV customer from approximately the summer of 2006 until October 2007.

5. Plaintiff Marlene Mecca is a resident of Sacramento, California. Ms. Mecca was a DIRECTV customer from approximately May 2006 until June 2008.

6. Plaintiff Kathy Greiner is a resident of Long Beach, California. Ms. Greiner was a DIRECTV customer from approximately June 24, 2002 until February 2008.

7. At all relevant times herein, Defendant DIRECTV, Inc. is a California corporation with its principal place of business in El Segundo, California. DIRECTV is the largest direct-to-home satellite television provider in the United States with over 16.8 million customers located throughout the United States. DIRECTV is also the second largest multi-channel video programming provider in the United States.

8. At all relevant times herein, Defendant DIRECTV and Does 1-100 did and do business in Los Angeles, California. There existed and exists a unity of interest and ownership between each of them, such that any individuality and separateness between them has ceased, and each such entity is the alter ego of each other entity.

9. The names of other Defendants and/or their involvement in Plaintiffs' situation are presently unknown to Plaintiffs, who therefore sue such Defendant in this action by fictitious names, identified as Does 1-100. Each of the Defendants designated as a Doe is legally responsible in some manner for the unlawful acts described above. Plaintiffs will seek leave of the Court to amend this complaint to reflect the true names and capacities of the Defendants designated as Does 1-100 when their identities and/or involvement become known.

10. Each Defendant (including Does 1-100) was at all relevant times the co-conspirator, employee, servant, partner, joint venturer, successor, assign, aider and/or abettor of each other Defendant with respect to the wrongful conduct alleged. Each was acting within the course and scope of said conspiracy, agency, employment, unity of interest and/or joint

venture and with the permission, knowledge, approval, ratification and consent of each other, and each is responsible and liable in some manner for the damages or injuries sustained or threatened to be sustained by Plaintiffs and the Class.

11. Whenever this complaint references acts of any Defendant or one of its unnamed agents or co-conspirators, such allegation shall be deemed to mean the act of all other Defendants, unless the reference is in a particular cause of action, in which case it shall be deemed to mean the act of all other Defendants named in that cause of action, and each of them acting, individually, jointly, and severally.

12. Defendants aided and abetted each other in accomplishing the wrongful acts. In doing so, Defendants acted with an awareness of their wrongdoing and realized that their conduct would substantially assist the accomplishment of the wrongful scheme.

13. Each Defendant committed, conspired to commit and/or ratified each of the acts and omissions alleged in this Complaint.

THE TRANSACTIONS BETWEEN THE PARTIES

14. DIRECTV typically receives orders for service from new customers and for change in service from existing customers by telephone. When accepting orders for new service, DIRECTV's policy and practice is to not inform customers of the term commitment or early cancellation penalty, and when accepting orders for changes in service, DIRECTV's policy and practice is to not inform customers that it takes the position that an early cancellation penalty

will apply to an extended term commitment occasioned by the change in service. It also typically does not inform customers of its asserted right to withdraw the early cancellation penalty directly from the customers' bank accounts or credit cards when the customers provide account information upon ordering service.

15. Notwithstanding this lack of information to customers, DIRECTV claims that customers agree to a term commitment and early cancellation penalty when DIRECTV's equipment is installed at the customer's residence and to an extended term commitment when malfunctioning equipment leased from DIRECTV is replaced or when customers change their service. Supposedly this agreement is on the back of a form and is provided by an installer, who typically is not an employee of DIRECTV. The installers are not instructed or authorized to call the customer's attention to the back of the form, let alone explain the terms of the form if customers have any questions.

16. DIRECTV also extends the alleged term contract when changes are made to customer accounts. This often happens with an upgrade in service or replacement of malfunctioning equipment. It is unclear how DIRECTV maintains that these customers have agreed to a term commitment or early cancellation penalty.

17. The experiences of Plaintiffs Imburgia, Mecca and Greiner are typical of the experiences of the Class members.

MS. IMBURGIA'S DEALINGS WITH DEFENDANTS

18. In the summer of 2006, Ms. Imburgia ordered services from DIRECTV by calling its toll free number and speaking to a DIRECTV customer service representative.

19. Shortly thereafter, DIRECTV sent an installer to install the system in Ms. Imburgia's residence.

20. In October 2007, Ms. Imburgia moved and contacted DIRECTV to discontinue service. At that time she was told that she would have to pay a $300 early cancellation penalty. At no time prior to her contact with DIRECTV seeking cancellation did anyone from or representing DIRECTV ever inform Ms. Imburgia about the existence of a term commitment or an early cancellation penalty.

21. DIRECTV gave Ms. Imburgia the option of suspending her service for approximately ten months. She agreed rather than pay $300.

22. In July 2008, following expiration of the suspension period, Ms. Imburgia cancelled her service after being informed that her new residence would not allow the system to work properly.

23. On July 24, 2008, DIRECTV charged Ms. frnburgia's credit card $640.95. Ms. Imburgia alleges that this amount included a $150 early cancellation penalty as well as equipment and service charges.

24. Ms. Imburgia suffered injury in fact resulting in the loss of money or property as a result of DIRECTV's unlawful conduct.

MS. MECCA'S DEALINGS WITH DEFENDANTS

25. In approximately June 2006, Ms. Mecca called DIRECTV and ordered service for her residence in Sacramento, California.

26. Shortly thereafter, DIRECTV installed two receivers in Ms. Mecca's home.

27. In approximately August 2007, Ms. Mecca called DIRECTV and requested a third receiver for her daughter's bedroom. DIRECTV installed a third receiver shortly thereafter.

28. Ms. Mecca contacted DIRECTV on or about June 16, 2008 to discontinue her DIRECTV service because she moved into an apartment building that was not compatible with DIRECTV's receiving equipment. DIRECTV informed her that she would be charged an early cancellation penalty of $175 if she cancelled her service. DIRECTV told Ms. Mecca that when she received the third receiver for her daughter's bedroom in August of 2007, she agreed to a term commitment that would not end until early 2009. At no time prior to her contact with DIRECTV seeking cancellation did anyone from or representing DIRECTV ever inform Ms. Mecca about the existence of a term commitment or an early cancellation penalty.

29. DIRECTV informed Ms. Mecca that it would send her a final bill that included the early cancellation penalty. Nine days after this conversation, Ms. Mecca discovered that DIRECTV had withdrawn $280 directly from her checking account without notifying her or otherwise receiving consent from her to withdraw these funds from her checking account.

30. Ms. Mecca suffered injury in fact resulting in the loss of money or property as a result of DIRECTV'S unlawful conduct.

MS. GREINER'S DEALINGS WITH DEFENDANTS

31. Ms. Greiner ordered DIRECTV's satellite television services beginning on June 24, 2002. In October 2007, Ms. Greiner ordered and received a replacement receiver from DIRECTV because her old receiver stopped working. Ms. Greiner did not receive a copy of the customer agreement at the time she placed her order and did not sign any agreement whatsoever.

32. In February 2008, Ms. Greiner began to experience technical difficulties with the replacement receiver. Ms. Greiner made approximately six telephone calls to DIRECTV customer service with no resolution of the equipment problem. During one call with DIRECTV customer service, the customer service representative suggested Ms. Greiner climb onto her roof to reset the equipment.

33. After nearly six years of being a DIRECTV customer, Ms. Greiner decided to discontinue service based on unusable equipment and poor customer service.

34. Ms. Greiner returned the equipment after disconnecting the service to avoid the unreturned equipment penalty. However, she was subsequently billed $240.00 for an early cancellation penalty.

35. Ms. Greiner was not aware that she was subject to a term commitment or early cancellation penalty and was surprised to be charged for

canceling her service after being a DIRECTV customer for over six years and returning all leased receiving equipment to DIRECTV. On or about April 1, 2008, without warning or notice, DIRECTV deducted the early cancellation penalty (less a refund for unused prepaid services) directly from Ms. Greiner's bank.

36. On or about April 11, 2008, Ms. Greiner reversed the charges through her bank and disputed the early cancellation penalty.

37. DIRECTV would not refund the early cancellation penalty and referred Ms. Greiner's account to collections.

38. On or about May 27, 2008, Ms. Greiner, through her attorney, sent DIRECTV a billing dispute letter requesting credit for the improperly charged early cancellation penalty. On or about July 2, 2008, DIRECTV's Collection Department responded to the May 27, 2008, letter and informed Ms. Greiner DIRECTV would not refund or credit her account for the early cancellation penalty.

39. Ms. Greiner's credit has been negatively impacted by this collection account. Ms. Greiner suffered injury in fact resulting in the loss of money or property as a result of DIRECTV's unfair and/or unlawful conduct.

DIRECTV'S UNLAWFUL, UNFAIR AND DECEPTIVE BUSINESS PRACTICES IMPOSING EARLY CANCELLATION PENALTIES

40. Plaintiffs are not alone in their complaints concerning DIRECTV's imposition of early cancellation penalties. The Internet contains scores

of complaints from customers complaining of DIRECTV's imposition of early cancellation penalties upon cancellation of service that DIRECTV justifies by a standardized and uniform agreement customers supposedly sign upon installation of equipment or receipt of replacement equipment, and additional complaints that DIRECTV has collected on the early cancellation penalties deducted directly from customers' accounts without their consent. Some of them, like Ms. Mecca have demanded copies of the documents they allegedly signed and been told by DIRECTV that it does not have those documents or DIRECTV has simply not responded to such requests. Other customers, like Ms. Greiner, have been told DIRECTV does not require a signature to complete an agreement.

41. Plaintiffs are informed and believe and thereon allege that, at all relevant times herein, the provisions containing the term commitment and early cancellation penalty are supposedly found on the back of a document, the front of which consists of an equipment installation checklist showing the equipment actually installed. The back is misleadingly entitled, "DIRECTV EQUIPMENT LEASE ADDENDUM" ("Lease Addendum") and is filled with single spaced terms in small type.

42. DIRECTV claims that Class members receive the Lease Addendum when DIRECTV'S equipment is installed at the customer's residence and when malfunctioning equipment leased from DIRECTV is replaced or when customers change their service. Supposedly this agreement is on the back of a form that an installer, who typically is not an employee of DIRECTV, provides. Plaintiffs are informed and

believe and thereon allege that, at all relevant times herein, the installers are not instructed or authorized to call the customer's attention to the back of the form, let alone explain the terms of the form if customers have any questions.

43. The top of the Lease Addendum states that it "MUST BE READ TOGETHER WITH THE DIRECTV CUSTOMER AGREEMENT (A COPY OF WHICH IS PROVIDED TO YOU WITH YOUR FIRST BILL AND IS AVAILABLE AT WWW.DIRECTV.COM) FOR ALL OF THE TERMS AND CONDITIONS REGARDING THE PROVISION OF THE SERVICES AND YOUR RIGHT TO USE THE DIRECTV EQUIPMENT." That is the closest DIRECTV typically comes to obtaining customers' agreement to the terms of the DIRECTV Customer Agreement. DIRECTV does not require a customer to sign the Lease Addendum or the Customer Agreement. It is the unsigned Customer Agreement, not the Lease Addendum, that includes language purportedly allowing DIRECTV to withdraw funds from customers' accounts without notice or permission. Plaintiffs are informed and believe, and based thereon allege, that DIRECTV, as its custom and practice, does not provide a copy of the Lease Addendum or the Customer Agreement to customers prior to delivery of its equipment and/or activation of its satellite television services.

44. The third paragraph of the Lease Addendum contains the term commitment. It provides: "The programming package(s) must be maintained for a period of not less than (a) eighteen (18) consecutive months for accounts with only standard receiver(s), or (b) twenty-four (24) consecutive months for

accounts with advanced product(s)/receiver(s) (DVR, HD, or HD DVR, including additional DIRECTV receiver(s))." The document does not state when the period begins to run, or whether the customer is subject to the 18 or the 24 month period. It also does not state that the period will start over upon a change of equipment or programming. Plaintiffs are further informed and believe, and based thereon allege, that DIRECTV requires this term commitment without regard to how long the customer has continuously received DIRECTV's services or whether the customer voluntarily upgraded to a new receiver or replaced an outdated or broken receiver. DIRECTV requires its customers to activate and commit to an additional term commitment each time they receive new or refurbished equipment, thereby extending the length of the term commitment. The extension of the term commitment is often done without prior notice to customers, and is contrary to the express terms of the Lease Addendum which says, "After you have fulfilled your agreement to the required programming package(s), you are not obligated to continue your subscription to DIRECTV programming for any specific duration" Ex. A at ¶3.

45. The sixth paragraph of the Lease Addendum contains the early cancellation penalty provision. Ex. A at ¶ 6. It provides, "If you fail to maintain your minimum programming commitment of 18 months for standard receivers and 24 months for advanced receivers, you agree that DIRECTV may charge you a prorated penalty of up to $360 for standard receivers and up to $480 for advanced products/receivers (e.g. DVR, HD, HD DVR, etc.)." The document does not state whether the basis for

proration is number of days, months or years the programming is maintained, amount of usage, number of receivers, or some other basis entirely. It also does not state how partial units, whether measured in days, months, or usage, are to be prorated.

46. The terms and conditions of the Customer Agreement state as follows: "Your Cancellation. You may cancel Service by notifying us... In addition to any deactivation or change of service penalties provided in Section 2, if you cancel Service or change your Service package, you may be subject to any early cancellation penalty if you entered into a separate programming commitment with DIRECTV in connection with obtaining Receiving Equipment, and have failed to maintain the required programming package for the required period of time." (Ex. B at § 5(b).)

47. Pursuant to the Customer Agreement, DEFENDANT "reserve[s] the right to change the terms and conditions on which [it] offer[s] Service." (Ex. B, § 4.)

48. In the event DIRECTV makes a change to the terms and conditions of service, a customer may cancel service if he/she does not agree to the changed terms or conditions. *Id.* However, the customer may still be charged the penalty and/or an additional "deactivation penalty" *Id.*

49. At all relevant times herein:

a. The Lease Addendum and Customer Agreement were conceived and drafted in El Segundo, California. Specifically, DIRECTV's decision to impose a term

commitment and early cancellation penalty on its customers was made in El Segundo, California and direction and oversight of the implementation and enforcement of that policy occurs at DIRECTV's corporate headquarters in El Segundo, California.

b. DIRECTV's policy of withdrawing these early cancellation penalties directly from the customer's credit card or bank account was conceived and implemented in El Segundo, California.

c. DIRECTV's decision not to have its customers sign the Customer Agreement but instead to post it on its website was made in El Segundo, California.

d. DIRECTV's decision to have its installers provide customers with an installation checklist with the Lease Addendum in small print on the reverse side, and not to call attention to the term commitment, and early cancellation penalty provisions was made in El Segundo, California.

e. In addition, DIRECTV's decisions as to the instructions to be given its customer service representatives, and devising of the training and oversight to be given its customer service representatives, were made in El Segundo, California.

f. In short, all of the policies and practices alleged in this Complaint to be improper were conceived of and directed, implemented and/or enforced in El Segundo, California.

CLASS ALLEGATIONS

A. Definition of the Class

50. Plaintiffs bring this action individually and on behalf of all persons as the Court may determine to be appropriate for class certification, pursuant to Code of Civil Procedure § 382 and Civil Code § 1781. Plaintiffs seek to represent a Class of consumers defined as:

> **All current and former DIRECTV customers in the State of California who were assessed an early cancellation penalty by DIRECTV during the four years preceding the filing of the original complaint through resolution of this action; and all current DIRECTV Customers in the State of California whose service DIRECTV asserts is subject to its policy regarding early cancellation penalties.**

Excluded from the Class are Defendants and their affiliates, predecessors, successors, officers, directors, agents, servants, or employees, and the immediate family members of such persons. Plaintiffs reserve the right to modify the class definition or propose one or more subclasses if discovery reveals such modifications are appropriate.

B. Numerosity

51. As of December 31, 2007, DIRECTV claims it had 16.8 million current customers. Plaintiffs are informed and believe that a significant portion of the 16.8 million reside in California. Accordingly, the members of the Class are so numerous that joinder is impracticable.

C. Commonality

52. There is a well-defined community of interest in the relevant questions of law and fact affecting putative Class members. Common questions of law and fact predominate over any individual questions affecting Class members, including, but not limited to the following:

a. Must any alleged contract, including any alleged extension of the contract when replacement or enhanced equipment is installed or new services are initiated, between DIRECTV and each Class member be in a writing signed by the Class member to be valid?

b. Does DIRECTV have the burden of proof to show that such a signed writing exists?

c. Are the term commitment and the early cancellation penalty provisions in the form Lease Addendum and the provision in the "Customer Agreement" draft purportedly allows DIRECTV to withdraw funds from customers' accounts without warning or permission enforceable?

d. Have DIRECTV and Class members entered into binding agreements when one set of terms are contained on the back of a form and the other is contained in a form that the customer does not sign, neither has been presented to the customer before the customer orally agrees to receive and pay for programming services, and the customer does not receive any

consideration at the time, if ever, that the two forms are presented to the customer?

e. Have Class members made binding promises as to term commitments and early cancellation penalties when the language of DIRECTV's form, if it is presented to the customers, does not contain a start date for the term, does not state clearly the length of the term, and does not state how the early cancellation penalty is to be calculated?

f. Are certain provisions of DIRECTV's Customer Agreement unconscionable, in violation of public policy or otherwise unenforceable, including but not limited to the term commitment, early cancellation penalty and any provision that purportedly allows DIRECTV to withdraw funds from customers' account without notice or permission as discussed above?

g. Has DIRECTV violated the Consumer Legal Remedies Act, Civil Code § 1750, *et seq.*, in its imposition and enforcement of term commitments, early cancellation penalties and/or the provision that purportedly allows DIRECTV to withdraw funds from customers' accounts without notice or permission?

h. Has DIRECTV engaged in false and misleading advertising in violation of Business & Professions Code § 17500?

i. Has DIRECTV committed illegal, unfair, deceptive and/or fraudulent business

practices in violation of Business & Professions Code § 17200 in its imposition and enforcement of term commitments, early cancellation penalties and/or the provision that purportedly allows DIRECTV to withdraw funds from customers' accounts without notice or permission?

j. Is DIRECTV's early cancellation penalty provision an illegal liquidated damages clause voidable pursuant to Civil Code § 1671(d)?

k. Has DIRECTV breached its obligations of good faith to Plaintiffs and the Class members?

l. Has DIRECTV been unjustly enriched?

m. Are Plaintiffs and the Class Members entitled to restitution of all amounts acquired by DIRECTV by enforcing the early cancellation penalty provisions?

n. Is injunctive relief appropriate?

o. What is the proper measure of damages incurred by Plaintiffs and the Class members?

D. Typicality

53. Plaintiffs have the same interests in this matter as all the other members of the Class, and their claims are typical of all members of the Class. If brought and prosecuted individually, the claims of each Class member would require proof of many of the same material and substantive facts, rely upon the same remedial theories and seek the same relief.

54. The claims of Plaintiffs and the other Class members have a common origin and share a common basis. The claims originate from the same illegal, unfair, deceptive and fraudulent practices on the part of DIRECTV and its acts in furtherance thereof.

55. All Class members have suffered injury in fact resulting in the loss of money or property by reason of DIRECTV's unlawful course of conduct in that they have paid, or are subject to, early cancellation penalties.

E. Adequacy of Representation

56. Plaintiffs' claims are sufficiently aligned with the interests of the absent members of the Class to ensure that the Class claims will be prosecuted with diligence and care by Plaintiffs as representatives of the Class. Plaintiffs will fairly and adequately represent the interests of the Class and do not have interests adverse to the Class.

57. Plaintiffs have retained the services of counsel, who are experienced in complex class action litigation, and in particular class actions involving consumer protection matters. Plaintiffs' counsel will adequately prosecute this action and will otherwise protect and fairly and adequately represent Plaintiffs and all absent Class members.

F. Class Treatment Is the Superior Method of Adjudication

58. The prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the parties opposing the Class. Such incompatible standards of conduct and varying adjudications on

the same essential facts, proof and legal theories would also create and allow the existence of inconsistent and incompatible rights within the Class.

59. Moreover, a class action is superior to other methods for the fair and efficient adjudication of the controversies raised in this Complaint because:

a. Individual claims by the Class members would be impracticable as the costs of pursuit would far exceed what any one Class member has at stake;

b. Very little individual litigation has been commenced over the controversies alleged in this Complaint and individual Class members are unlikely to have an interest in separately prosecuting and controlling individual actions;

c. The concentration of litigation of these claims in one forum will achieve efficiency and promote judicial economy; and

d. The proposed class action is manageable.

60. Therefore, class treatment of Plaintiffs' claims is appropriate and necessary.

JURISDICTION AND VENUE

61. This Court has jurisdiction under Code of Civil Procedure § 410.10. Plaintiffs' damages exceed the jurisdictional minimum of this Court. Venue is proper in the County of Los Angeles because a substantial amount of Defendants' conduct complained of herein took place in the County of Los Angeles.

62. Venue is also proper in this County under Business & Professions Code § 17204 and Civil Code § 1780(c) because Defendants are located and/or are doing business in this County and throughout the State of California, and the practices being challenged by this action were, on information and belief, conceived and/or created in this County. Further, greater than two-thirds of the members of the proposed Class in the aggregate are citizens of the State of California.

CAUSE OF ACTION I

VIOLATIONS OF THE CONSUMER LEGAL REMEDIES ACT CAL. CIV. CODE § 1750, *et seq.*

(Brought by Plaintiffs and the Class Against Defendant DIRECTV and Does 1-100)

63. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

64. This cause of action is brought pursuant to the California Consumer Legal Remedies Act ("CLRA"), Civil Code § 1750, *et seq.* Plaintiffs bring this action on their own behalf and on behalf of the Class members, all of whom are similarly situated consumers within the meaning of Civil Code § 1781.

65. DIRECTV has violated the CLRA, Civil Code §§ 1770(a)(9), (a)(14) and (a)(19) by:

a. Failing to disclose and/or failing to adequately disclose to Class members the supposed term commitment associated with DIRECTV programming service;

b. Failing to disclose and/or failing to adequately disclose to Class members that

they would be charged an early cancellation penalty if they did not continue to receive DIRECTV's programming services for the alleged term commitment;

c. Failing to disclose and/or failing to adequately disclose to Class members that early cancellation penalties would be deducted directly from Class members' bank or credit card accounts;

d. Including unconscionable and unenforceable terms and conditions in the Lease Addendum and Customer Agreement;

e. Enforcing unconscionable and unenforceable terms and conditions against Class members, including terms and conditions that Class members never accepted or otherwise agreed to;

f. Collecting early cancellation penalties from Class members and charging such penalties directly to Class members' bank account or credit card; and

g. Advertising goods or services with the intent not to sell them as advertised.

66. As a result of such actions, Plaintiffs and Class members have been damaged.

67. Plaintiffs have suffered as a result of Defendants' unlawful conduct because they paid penalties, or were assessed such penalties, based on Defendants' representation that the transaction involved an obligation to do so when, in fact, there was no obligation to pay early cancellation penalties

following cancellation of DIRECTV's services. Moreover, Plaintiffs have also suffered as a result of being subject to the unconscionable provisions requiring payments of early cancellation penalties following cancellation of DIRECTV's services.

68. Defendants misrepresented and concealed from Plaintiffs that Defendants did not have the right to require payments following cancellation of DIRECTV's services.

69. Defendants' misrepresentations and omissions described in the preceding paragraphs were intentional, or alternatively, made without the use of reasonable procedures adopted to avoid such an error.

70. Defendants, directly or indirectly, have engaged in substantially similar conduct to Plaintiffs and to each member of the Class.

71. Such wrongful actions and conduct are ongoing and continuing. Unless Defendants are enjoined from continuing to engage in such wrongful actions and conduct, members of the consuming public will continue to be damaged by Defendants' conduct.

72. Defendants, and each of them, aided and abetted, encouraged and rendered substantial assistance in accomplishing the wrongful conduct and their wrongful goals and other wrongdoing complained of herein. In taking action, as particularized herein, to aid and abet and substantially assist the commission of these wrongful acts and other wrongdoings complained of, each of the defendants acted with an awareness of his/her/its primary wrongdoing and realized that his/her/its

conduct would substantially assist the accomplishment of the wrongful conduct, wrongful goals, and wrongdoing.

73. Plaintiffs and the Class are entitled to an injunction, pursuant to Civil Code § 1780(a)(l)-(3), prohibiting DIRECTV from continuing to engage in the above-described violations of the CLRA; actual damages for Plaintiffs and Class members; restitution of property; punitive damages; and any other relief the court deems proper, including special statutory damages permitted by the CLRA. Plaintiffs further seek reasonable attorney's fees under Civil Code § 1780(d).

74. Pursuant to Civil Code § 1782, Plaintiffs Imburgia, Mecca and Greiner notified DIRECTV in writing, of the particular violations of Civil Code § 1770 alleged in this complaint and demanded that DIRECTV rectify the problems associated with the practices and policies as set forth herein. Those notices were sent by certified mail, return receipt requested, at least 30 days prior to the filing of their original complaints. DIRECTV failed to provide the relief demanded in Plaintiffs' notices within 30 days. Therefore, Plaintiffs intend to seek restitution and damages.

CAUSE OF ACTION II

VIOLATIONS OF THE CALIFORNIA FALSE ADVERTISING LAW

CAL. BUS. & PROF. CODE § 17500

(Brought by Plaintiffs and the Class Against Defendant DIRECTV and Does 1-100)

75. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

76. DIRECTV violated California's False Advertising Law, Business & Professions Code § 17500 by:

a. Failing to disclose and/or failing to adequately disclose to Class members the supposed term commitment associated with DIRECTV programming service;

b. Failing to disclose and/or failing to adequately disclose to Class members that they would be charged an early cancellation penalty if they did not continue to subscribe to DIRECTV's programming services for the alleged term commitment; and

c. Failing to disclose and/or failing to adequately disclose to Class members that early cancellation penalties would be deducted directly from Class members' bank or credit card accounts.

77. These representations and/or omissions have deceived and are likely to deceive Plaintiffs, the Class and the public in connection with their decision to subscribe to DIRECTV's programming without being apprised of Defendants' term commitments, early cancellation penalty provisions and/or any provision that purportedly allows DIRECTV to withdraw funds from customers' account without notice or permission. DIRECTV's representations also have deceived and are likely to deceive Plaintiffs, the Class and the public with

respect to their supposed obligation to pay DIRECTV's early cancellation penalties. Thus, Plaintiffs and Class members were deprived of their monies and property as a result of DIRECTV's acts and practices. Had Plaintiffs and Class members known the actual facts, they would not have paid DIRECTV's early cancellation penalties.

78. Defendants, directly or indirectly, have engaged in substantially similar conduct to each Plaintiff and to each member of the Class.

79. Defendants, and each of them, aided and abetted, encouraged and rendered substantial assistance in accomplishing the wrongful conduct and their wrongful goals and other wrongdoing complained of herein. In taking action, as particularized herein, to aid and abet and substantially assist the commission of these wrongful acts and other wrongdoings complained of, each of the defendants acted with an awareness of his/her/its primary wrongdoing and realized that his/her/its conduct would substantially assist the accomplishment of the wrongful conduct, wrongful goals, and wrongdoing.

80. Plaintiffs and Class members have been damaged by DIRECTV's violation of § 17500.

81. As a result of the conduct described above, Defendants have been and will be unjustly enriched at the expense of Plaintiffs and Class members. Specifically, Defendants have been unjustly enriched by receiving substantial monies in the form of early cancellation penalties deducted directly fro Plaintiffs and Class members' bank or credit card accounts.

82. So as not to be unjustly enriched by their own wrongful actions and conduct, Defendants should be required to disgorge and restore to Plaintiffs and Class members all monies wrongfully obtained by Defendants as a result of their false and misleading advertising, together with interest.

83. Such wrongful actions and conduct are ongoing and continuing. Unless Defendants are enjoined from continuing to engage in such wrongful actions and conduct, members of the consuming public will continue to be damaged by Defendants' conduct.

CAUSE OF ACTION III

VIOLATIONS OF THE CALIFORNIA UNFAIR COMPETITION LAW

CAL. BUS. & PROF. CODE § 17200

(Brought by Plaintiffs and the Class Against Defendant DIRECTV and Does 1-100)

84. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

85. Defendants have violated Business & Professions Code § 17200's prohibition against engaging in an unlawful, unfair or fraudulent business acts or practices by, *inter alia*, the following:

a. Violating Business & Professions Code § 17500, *et seq.* (as further alleged herein);

b. Violating the CLRA, Civil Code § 1750, *et seq.* (as further alleged herein);

c. Violating Civil Code § 1671(d) (as further alleged herein);

d. Violating Civil Code § 1670.5 and § 1750, *et seq.* because the early cancellation penalties and related provisions of the Lease Addendum and Customer Agreement are unconscionable (as further alleged herein);

e. By including illegal and unconscionable early cancellation penalties and related terms in the Lease Addendum and Customer Agreement (as further alleged herein), which makes the purported contracts subject to rescission by Plaintiffs pursuant to Civil Code § 1689, *et seq.*

f. By failing to disclose, concealing material facts and/or misrepresenting the supposed term commitment associated with DIRECTV programming service, the early cancellation penalty provisions associated with DIRECTV's programming service, that an early cancellation penalty would be imposed if a customer did not maintain DIRECTV's programming services for the alleged term commitment, and that early cancellation penalties would be deducted directly from Class members' bank or credit card accounts in violation of Civil Code §§ 1572, 1709 and 1710.

86. Defendants engage in a systematic scheme to charge and collect early cancellation penalties from Plaintiffs and Class members in violation of state law and the fundamental policies delineated in statutory provisions. DIRECTV's early cancellation penalty practices also violate the unfair prong of the UCL because the practice is oppressive,

unscrupulous or substantially injurious to consumers and the competitive process when consumers are effectively locked into continuing their service with DIRECTV by a charge that is out of proportion to the harm, if any, suffered by the provider as a result of the cancellation of services and does not represent a reasonable calculation of the damages, if any, caused by such cancellation. Such penalties prevent Plaintiffs and the Class members from freely choosing a satellite or cable television provider by imposing unnecessary costs to switch providers and impede free competition between providers on price, coverage, service, quality, terms of service, technology and ease of use. As a result, Defendants engage in unfair business practices prohibited by Business & Professions Code § 17200, *et seq.*

87. Business & Professions Code § 17200 also prohibits any "fraudulent... business act or practice." As detailed in the preceding paragraphs, Defendants' conduct did deceive and is likely to deceive Plaintiffs, the Class and the public by, *inter alia*, engaging in the following deceptive business practices:

a. Failing to disclose and/or failing to adequately disclose to Class members the supposed term commitment associated with DIRECTV programming service;

b. Failing to disclose and/or failing to adequately disclose to Class members that they would be charged an early cancellation penalty if they did not continue to subscribe to DIRECTV's programming services for the alleged term commitment;

c. Failing to disclose and/or failing to adequately disclose to Class members that early cancellation penalties would be deducted directly from Class members' bank or credit card accounts;

d. Including unconscionable and unenforceable terms and conditions in the Lease Addendum and Customer Agreement; and

e. Enforcing unconscionable and unenforceable terms and conditions against Class members, including terms and conditions that Class members never accepted or otherwise agreed to.

88. As a result of such actions, Plaintiffs and Class members suffered damages.

89. Such wrongful actions and conduct are ongoing and continuing. Unless Defendants are enjoined from continuing to engage in such wrongful actions and conduct, members of the consuming public will continue to be damaged by Defendants' conduct.

90. Pursuant to Business & Professions Code § 17203, Plaintiffs and Class members seek an order requiring Defendants to immediately cease such unlawful, unfair and deceptive business practices and requiring them to return the full amount of money improperly collected from Plaintiffs and Class members including, but not limited to, early cancellation penalties, plus interest and attorneys' fees, and take all steps necessary to remove any adverse indication on Plaintiffs and Class members'

credit report(s) in relation to the early cancellation penalties.

CAUSE OF ACTION IV

VIOLATION OF CIVIL CODE § 1671(d)

(Brought by Plaintiffs and the Class Against Defendant DIRECTV and Does 1-100)

91. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

92. Plaintiffs allege, in the alternative, that the early cancellation penalties imposed by DIRECTV are unlawfid liquidated damages because they are not designed to compensate DIRECTV for any damages arising from Plaintiffs' and the Class Members' cancellation, but rather are designed to lock in Plaintiffs and the Class members and serve as a disincentive to prevent Plaintiffs and the Class members from switching to competing services in the event they become dissatisfied with the service provided by DIRECTV or can no longer access DIRECTV's service. To the extent that DIRECTV suffers any damage upon cancellation of service and return of equipment by Plaintiffs and the Class members, it would not be impracticable or extremely difficult to fix the actual damages in the event a consumer prematurely terminated their service with DIRECTV.

93. The early cancellation penalties imposed by DIRECTV are also unlawful liquidated damages because the parties did not agree on an amount to be the presumed damages, and DIRECTV did not make a reasonable effort to set the liquidated damages at

the average amount of damages upon premature termination of service.

94. Plaintiffs and Class members have been damaged by DIRECTV's imposition and collection of early cancellation penalties as invalid liquidated damages under Civil Code § 1671(d).

95. Such wrongful actions and conduct are ongoing and continuing. Unless Defendants are enjoined from continuing to engage in such wrongful actions and conduct, members of the consuming public will continue to be damaged by Defendants' conduct.

CAUSE OF ACTION V

COMMON COUNT FOR MONEY HAD AND RECEIVED

(Brought by Plaintiffs and the Class Against Defendant DIRECTV and Does 1-100)

96. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

97. Within the last four years at El Segundo, California, DIRECTV unlawfully collected early cancellation penalties in varying sums ranging in excess of $1.00 to $480.00 from former customers. These amounts were collected from Plaintiffs and the Class members by DIRECTV as unlawful early cancellation penalties.

98. DIRECTV collected early cancellation penalties from Plaintiffs and the Class members by enforcing terms included in the Lease Addendum and Customer Agreement which are unconscionable

and voidable based on the lack of contractual formation and mutual assent.

99. Plaintiffs have repeatedly demanded payment from DIRECTV placing telephone calls to DIRECTV customer service and/or collection centers and sending dispute letters and/or Consumer Legal Remedies Act notice letters requesting reimbursement for these unlawfully charged and collected penalties.

100. As a result of DIRECTV's failure to repay the amount owed, Plaintiffs and the Class members have been damaged in a sum certain to be determined according to proof, together with accrued interest on that sum, and all attorney's fees and costs incurred in collecting this amount.

101. Such wrongful actions and conduct are ongoing and continuing. Unless Defendants are enjoined from continuing to engage in such wrongful actions and conduct, members of the consuming public will continue to be damaged by Defendants' conduct.

CAUSE OF ACTION VI

UNJUST ENRICHMENT

(Brought by Plaintiffs and the Class Against Defendant DIRECTV and Does 1-100)

102. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

103. DIRECTV has been unjustly enriched by obtaining and retaining the property of its customers that it was not entitled to. The early cancellation penalties DIRECTV collected from its customers are

unlawful and unenforceable because DIRECTV did not adequately inform Class members of the term commitment, early cancellation penalties and the provision that purportedly allows DIRECTV to withdraw funds from customers' account without notice or permission. These provisions are unconscionable, and the early cancellation penalties are unlawful liquidated damages.

104. It would be inequitable for Defendant to continue to retain the money of Plaintiffs and the Class members.

CAUSE OF ACTION VII

DECLARATORY RELIEF

(Brought by Plaintiffs and the Class Against Defendant DIRECTV and Does 1-100)

105. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

106. An actual controversy has arisen and now exists between Plaintiffs and Defendants concerning their respective rights and duties in that Plaintiffs contend, and Defendants deny, that:

a. DIRECTV's Customer Agreement and Lease Addendum (collectively "Agreements") with Plaintiffs and all Class members, including its tenn commitment, early cancellation penalty and the provision that purportedly allows DIRECTV to withdraw funds from customers' accounts without notice or permission, are subject to rescission pursuant to Civil Code § 1689, for multiple reasons, including but not limited to:

i. DIRECTV did not obtain (or maintain) writings signed by Plaintiffs and Class members agreeing to these terms;

ii. DIRECTV did not adequately set forth these terms, either orally or in writing, to make them enforceable; and

iii. Plaintiffs and Class members did not accept the terms and conditions of the Lease Addendum and Customer Agreement;

b. In the alternative, the terms and conditions of the Agreements are illegal under Civil Code § 1671(d);

c. In the alternative, the early cancellation penalties and related provisions of the Agreements are unconscionable pursuant to § 1670.5, *et seq.*; and

d. In the alternative, the Agreements are procedurally and substantively unconscionable.

i. The Agreements are preprinted, standardized contracts of adhesion that are not subject to modification or negotiation and are presented to customers after the delivery and activation of equipment on a take it or leave it basis. DIRECTV did not provide Plaintiffs and Class members copies of the Agreements prior to activation of service and did not require Plaintiffs and Class members to sign the Agreements indicating consent to be bound by their terms and conditions.

ii. DIRECTV ties the lease of equipment for which it provides no warranty to a term commitment of up to 24 months and a corresponding early cancellation penalty for canceling service. This is above and beyond the requirement that all equipment must be returned to DIRECTV and separate penalties DIRECTV charges for deactivation, failure to return equipment, and failure to activate service.

iii. Acceptance of DIRECTV's terms and conditions lacks a modicum of bilaterality. DIRECTV's terms and conditions provide that it may change the terms and conditions on which it offers service at any time, but does not allow customers to change the terms and conditions either before or after leasing equipment and purchasing services from DIRECTV, and if Plaintiffs or Class members cancel service, even because of such a change, DIRECTV charges them a penalty. Plaintiffs and Class members were presented with DIRECTV's terms and conditions on a take it or leave it basis with no ability to negotiate. As such, Plaintiffs and Class members had unequal bargaining power, no real negotiation, and an absence of meaningful choice.

iv. The penalty imposed by DIRECTV is not based on the estimated or actual

damage DIRECTV would incur as a result of a cancellation of service and return of receiving equipment, especially since DIRECTV has received the leased equipment back and can reissue the equipment to a different customer.

v. Since the Agreements are both procedurally and substantively unconscionable, they are unenforceable as a matter of law.

vi. DIRECTV has enforced these unconscionable and unenforceable terms and conditions against Plaintiffs and Class members by charging Plaintiffs and Class members early cancellation penalties and by collecting these early cancellation penalties and other amounts allegedly due directly from customer's bank or credit card accounts.

vii. Plaintiffs and Class members have been damaged by DIRECTV's practice of imposing unconscionable and unenforceable contract terms and conditions against them.

viii. Such wrongful actions and conduct are ongoing and continuing. Unless Defendants are enjoined from continuing to engage in such wrongful actions and conduct, members of the consuming public will continue to be damaged by Defendants' conduct.

107. Plaintiffs desire a judicial determination of their and Class members' rights and duties arising from DIRECTV's Agreements.

108. A judicial declaration is necessary and appropriate so that the parties may ascertain their rights and duties arising from the aforementioned transactions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the proposed Class, pray for judgment as follows:

A. Certification of the proposed Class pursuant to Code Of Civil Procedure § 382 and Civ. Code § 1780, *et seq.*;

B. Designation of Plaintiffs as representative of the proposed Class and designation of their counsel as Class counsel;

C. Judgment in favor of Plaintiffs and the Class members and against DIRECTV;

D. Award Plaintiffs and the Class members restitution, disgorgement, actual, statutory and punitive damages, and attorneys' fees and costs, including pre-judgment and post-judgment interest thereon;

E. Temporary, preliminary and permanent order for injunctive relief enjoining DIRECTV from continuing to engage in the business practices complained of herein;

F. Such further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

Dated: March 13th, 2009

Respectfully submitted,
WATERS KRAUS & PAUL, LLP

/s/ Gary M. Paul

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

AMY IMBURGIA and MARLENE MECCA, and KATHY GREINER, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

DIRECTV, INC.,

Defendant.

CASE NO. BC398295

DIRECTV, INC.'S ANSWER TO PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

Judge:	Hon. Emilie H. Elias
Dept.:	324
Am. Comp. Filed:	03/16/2009
Trial date:	None

Defendant DIRECTV, Inc. ("DIRECTV") answers Plaintiffs Imburgia, Mecca, and Greiner's First Amended Class Action Complaint as follows:

GENERAL DENIAL

Pursuant to California Code of Civil Procedure § 431.30(d), DIRECTV generally denies each and every material allegation contained in the First Amended

Class Action Complaint, and denies that this action is properly maintainable as a class action.

AFFIRMATIVE DEFENSES

DIRECTV sets forth below its affirmative defenses. Each affirmative defense is asserted as to all claims against DIRECTV. By setting forth these affirmative defenses, DIRECTV does not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiffs. Moreover, nothing stated herein is intended to be construed as an acknowledgment that any particular issue or subject matter is relevant to Plaintiffs' allegations. Furthermore, DIRECTV is still in the process of conducting a factual investigation of the claims, and thus reserves the right to amend or supplement its affirmative defenses accordingly.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Lack of Standing)

Plaintiffs and the putative class lack standing to assert the claims alleged in the Complaint.

THIRD AFFIRMATIVE DEFENSE

(Statute of Limitations)

Plaintiffs' action is barred by the statute of limitations applicable to their claims and any claims of the putative class members.

FOURTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

Without admitting that any act of DIRECTV caused damage to Plaintiffs or any other person, DIRECTV asserts that any recovery by Plaintiffs must be diminished or barred by reason of their failure to mitigate or attempt to mitigate any alleged damages.

FIFTH AFFIRMATIVE DEFENSE

(Reliance Unreasonable)

Without admitting that Plaintiffs have stated a cause of action under California Business and Professions Code §§ 17200, *et seq.*, or under California Consumers Legal Remedies Act, or sufficiently pled reliance, DIRECTV alleges that Plaintiffs' claims are barred because any reliance any Plaintiffs on any alleged representations was not reasonable.

SIXTH AFFIRMATIVE DEFENSE

(Good Faith / Bona Fide Error)

Without admitting any alleged violation of the California Consumers Legal Remedies Act, DIRECTV asserts as a defense to Plaintiffs' first claim for relief that any alleged violation of the California Consumers Legal Remedies Act was not intentional, but rather resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error, and DIRECTV made appropriate correction to the issue once notified of the error.

SEVENTH AFFIRMATIVE DEFENSE

(Voluntary Payment)

Plaintiffs' claims and/or those by the putative class members are barred by the voluntary payments doctrine because they were paid under a claim of right to the payment with full knowledge of the facts.

EIGHTH AFFIRMATIVE DEFENSE

(Injury Caused by Third Parties)

Plaintiffs' claims are barred because any harm allegedly suffered by Plaintiffs or any putative class members was caused and/or contributed to by third parties.

NINTH AFFIRMATIVE DEFENSE

(Unjust Enrichment/Quantum Meruit)

Plaintiffs may not recover any amount paid to DIRECTV because such recovery would amount to unjust enrichment. In addition, though valid contracts exist between Plaintiffs and DIRECTV, if Plaintiffs prove that these contracts are unenforceable and unconscionable as they allege, then Plaintiffs have been unjustly enriched and DIRECTV is entitled to restitution or relief in quantum meruit.

TENTH AFFIRMATIVE DEFENSE

(Waiver)

Any recovery under the Complaint is barred because Plaintiffs and the putative class members have waived their right to challenge the conduct alleged.

ELEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

Any recovery under the Complaint is barred because Plaintiffs and the putative class members are estopped from challenging the conduct alleged.

TWELFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

Any recovery under the Complaint is barred by the doctrine of unclean hands.

THIRTEENTH AFFIRMATIVE DEFENSE

(Adequacy of Remedy at Law)

The injury or damage suffered by Plaintiffs, if there is any, would be adequately compensated in an action at law for damages. Accordingly, Plaintiffs have a complete and adequate remedy at law and are not entitled to seek equitable relief.

FOURTEENTH AFFIRMATIVE DEFENSE

(Offset)

Without admitting any wrongdoing related to customer programming commitments or the calculation and assessment of early cancellation fees, any recovery under the Complaint must be offset against any damages DIRECTV suffered due to Plaintiffs' and any member of the putative class's failure to fulfill their programming commitment or pay their early cancellation fees, or against any amounts by which Plaintiffs and members of the putative class were unjustly enriched.

FIFTEENTH AFFIRMATIVE DEFENSE

(Alternative Means of Performance)

The early cancellation fee described in the Complaint is not an unlawful liquidated damages provision, but rather presented Plaintiffs and putative class members with a rational choice between alternatives — either continue to subscribe to a certain level of programming for the agreed-upon period or cancel early and pay the lower early cancellation fee. The early cancellation fee thus represents a lawful alternative means of performance under California law.

SIXTEENTH AFFIRMATIVE DEFENSE

(Right to Assert Cross-Complaint if Warranted)

DIRECTV expressly reserves its right to assert cross-complaints against the Plaintiffs or members of the putative class. This reservation includes, but is not limited to, potential cross-complaints against Plaintiffs or putative class members for breach of contract in the event the Court determines that DIRECTV'S early cancellation fee is a liquidated damages provision and not an alternative means of performance.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Reservation of Other Affirmative Defenses)

DIRECTV continues to investigate the facts and evidence surrounding the allegations in the Complaint and is therefore unable to ascertain at this time any additional defenses it may have, DIRECTV expressly reserves its right to amend this Answer to assert such other affirmative defenses as

may become apparent subsequent to the filing of this Answer, whether in discovery, at trial, or otherwise.

DIRECTV'S PRAYER FOR RELIEF

WHEREFORE, DIRECTV denies that Plaintiffs are entitled to any of the relief sought in the Complaint or to any relief whatsoever, and prays for judgment as follows:

A. That Plaintiffs take nothing under the Complaint and that the Complaint be dismissed with prejudice;

B. That judgment be entered in favor of DIRECTV as to all causes of action asserted against it;

C. That DIRECTV be awarded its costs of suit and reasonable attorneys' fees to the extent permitted by law; and

D. That DIRECTV be granted such other and further relief as the Court deems just and proper.

DATED: February 16, 2010

KIRKLAND & ELLIS LLP

By: */s/ Robyn Bladow*
Robyn Bladow

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FILED
LOS ANGELES
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MAY 17 2011
JOHN A.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

AMY IMBURGIA, MARLENE MECCA, and KATHY GREINER, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

DIRECTV, INC.,

Defendant.

Case No. BC398295

DECLARATION OF VALERIE W. MCCARTHY FILED IN SUPPORT OF DIRECTV'S MOTION TO COMPEL ARBITRATION

Judge:	Hon. Emilie H. Elias
Dept.:	324
Am. Comp. Filed:	03/16/2009
Trial Date:	None
Hearing Date:	June 30, 2011
Hearing Time:	2:30 p.m.

I, Valerie W. McCarthy, declare as follows:

1. I have been employed by DIRECTV, Inc. ("DIRECTV") for over fifteen years, and for more than the past ten years have held the position of Senior Manager in Customer Care. In my current position, I work with subscriber data as pan of my daily job functions. That work includes the review of billing records and other customer records that indicate how, when, and what amounts customers are billed each month, as well as any inserts that are provided with those bills. The billing records also reflect the amounts and the method by which each customer pays his/her monthly bill. I am also knowledgeable about the written contract that governs DIRECTV's relationship with its customers (the "Customer Agreement"), and the process by which customers receive the Customer Agreement, including the specific process performed by our vendor in mailing the document out to DIRECTV's customers. The facts contained in this declaration are based on my personal knowledge and my review of DIRECTV corporate records, and I can testify competently to them if called upon to do so.

2. DIRECTV provides digital television services to consumers nationwide. To obtain these services, a potential DIRECTV subscriber obtains, either directly from DIRECTV or a retailer, the equipment necessary to receive DIRECTV's satellite signal. Once the equipment is installed, the potential customer then selects one or more of DIRECTV's programming packages mid services. DIRECTV then activates the customer's services, and the customer begins to receive programming.

The Customer Agreement

3. The relationship between DIRECTV and each customer is governed principally by the Customer Agreement, which is available on DIRECTV's website, www.directv.com. At the time each of the Plaintiffs in this lawsuit first signed up for DIRECTV service (2002 for Kathy Greiner, and 2006 for Amy Imburgia), DIRECTV'S practice was to mail the DIRECTV Customer Agreement to each customer along with his or her first billing statement. Now, DIRECTV sends the Customer Agreement to new customers along with the initial confirmation letter after the customer places his or her order. The Customer Agreement sets forth the parties' rights and obligations and explains the terms and conditions of subscribing to DIRECTV services.

4. When the Customer Agreement is updated, a copy of the updated Customer Agreement is mailed to DIRECTV's existing customers along with their next billing statement. For customers who do not receive hard-copy billing statements from DIRECTV (such as customers who accept terms and conditions to view their electronic statements online, or who receive their DIRECTV billing integrated with a Partner's billing on the Partners' statement), a copy of the Customer Agreement is mailed separately to the customer's billing address. A copy of the updated Customer Agreement is also always available to be read and/or printed from the website at directv.com/legal.

5. I have been informed that the class period in this lawsuit runs from September 17, 2004 to the present. On September 17, 2004, the version of the

DIRECTV Customer Agreement then in effect was the one dated September 2003. A true and correct copy of the September 2001 Customer Agreement is attached hereto as Exhibit A. Between September 17, 2004 and the present, DIRECTV has updated its Customer Agreement on several occasions, mailing updated agreements dated October 2004, May 2006, April 2007, April 2009, April 2010, and April 2011 to its customers. True and correct copies of these Customer Agreements are attached hereto as Exhibits B-G.

6. In my experience, if a customer has requested to receive a paper bill every month and does not receive his or her printed bill, the customer either contacts DIRECTV to inquire why they did not receive their bill, or their sendee is shut off for failure to pay. If the latter, when the customer calls to reinstate service, they generally tell DIRECTV they did not pay because they did not receive their bill. In either case, the agent verifies the mailing address with the customer and makes any necessary updates.

7. The vendor responsible for mailing DIRECTV billing statements to DIRECTV customers is DST Output. DST Output has been DIRECTV's vendor for this purpose since the launch of DIRECTV's business in June 1994. I am familiar with the procedure by which DST Output performs its services and I have on multiple occasions visited the operating center in Hartford, Connecticut where mass mailing for DIRECTV bills are prepared and sent out.

8. DIRECTV contracts with DST Output to produce and distribute all printed and electronic

DIRECTV bills. DST Output uses a web-based tool that tracks every printed bill statement, as well as each document inserted into an envelope with that statement, which is mailed to DIRECTV customers. DIRECTV provides DST Output with the segmentation criteria of customers who should receive any particular document in their bill envelope. These segmentation criteria, or "business rules," are keyed into DST Output's Campaign Manager messaging and inserting application. This application permits DIRECTV to dictate the specific items that are to be included with the monthly bill statements mailed to its customers. DST Output uses automated equipment to print out, insert, and mail the billing statements from data that DIRECTV provides. DST Output prints out the appropriate statements daily, which are fed through an "inserting machine" that also inserts individual documents as specified by DIRECTV, via the Campaign Manager application, into the outside bill envelope, such as remittance envelopes, Customer Agreements, and any promotional materials that are to be included with that month's bill.

9. This Campaign Manager messaging and inserting application has been used since January 2001. DST Output is a reliable and efficient vendor.

10. Approximately 500,000 bills (and sometimes over 1,000,000) are mailed to DIRECTV customers every day via this process coordinated by DST Output and DIRECTV. The addresses to which these mailings are sent are the billing addresses provided to DIRECTV by its customers. That address is printed on the billing statement, which is inserted into the envelope in a manner that allows

the address to be read by the postal service. The mail is sorted by zip code for different regions of the country, and then mailed using the United States Postal Service.

Plaintiff Kathy Greiner

11. I have been asked to provide information about the DIRECTV service account of Kathy Greiner (DIRECTV Account Number 023412963). I have reviewed the customer records for this account, which were created by DIRECTV in the regular course of business at or near the time of the events recorded and are maintained by DIRECTV in the regular course of business, and I discuss their contents below.

12. Kathy Greiner began subscribing to DIRECTV services on approximately June 24, 2002. Ms. Greiner's customer records indicate that her preference was to receive paper billing statements. DIRECTV mailed Ms. Greiner her first Customer Agreement (a copy of which is attached as Exhibit A) along with her first billing statement on or about June 25,2002, and sent updated Customer Agreements (attached as Exhibits B and C) along with her monthly billing statements on or about October 25, 2004 and April 25, 2006. Upon receiving each of these Customer Agreements, Ms. Greiner did not call DIRECTV to dispute any terms or conditions in the Customer Agreements, or to cancel her DIRECTV service.

13. On or about April 25, 2007, DIRECTV mailed to Ms. Greiner the 2007 Customer Agreement (attached as Exhibit D) along with her monthly billing statement. After receiving the 2007 Customer Agreement, Ms. Greiner did not dispute any terms or

conditions in the Agreement, and did not cancel her DIRECTV services.

14. Between October 26, 2006 and September 27, 2007, Ms. Greiner accepted a total of $120 in monthly package discount credits from DIRECTV. On October 24,2007, Ms. Greiner ordered a leased Digital Video Recorder ("DVR") receiver to replace her owned, out-of-warranty receiver. Ms. Greiner obtained this new leased receiver for only the cost of handling and delivery in exchange for an agreement to purchase a certain level of programming for two years. On March 9, 2008. Ms. Greiner called DIRECTV and canceled her DIRECTV service. Because she did so before fulfilling her programming commitment, DIRECTV assessed Ms. Greiner a prorated early cancellation fee.

15. Based on my review of DIRECTV records, Ms. Greiner registered herself as a directv.com user, which allows customers the option to, among other things, view billing statements and recent transactions, make payments, order equipment, and schedule appointments online. To register as a directv.com user, Ms. Greiner had to visit DIRECTV's website and create an account with a username and password. She would have had access to the Customer Agreement and other terms and conditions while she was registering on DIRECTV's website, and during any subsequent visits to directv.com.

Plaintiff Amy Imburgia

16. I have been asked to provide information about the DIRECTV service account of Amy Imburgia (DIRECTV Account Number 044675996). I have reviewed the customer records for this account,

which were created by DIRECTV in the regular course of business at or near the time of the events recorded and are maintained by DIRECTV in the regular course of business, and I discuss their contents below.

17. Ms. Imburgia began subscribing to DIRECTV services on approximately September 23, 2006. Ms. Imburgia's customer records indicate that her pretference was to receive paper billing statements. DIRECTV mailed Ms. Imburgia her first Customer Agreement (Exhibit C) along with her first billing statement on or about September 24, 2006. Eight months later, on or about May 24, 2007, DIRECTV mailed Ms. Imburgia the updated 2007 Customer Agreement (Exhibit D) along with her monthly billing statement. After receiving the 2006 and 2007 Customer Agreements, Ms. Imburgia did not call DIRECTV to dispute any terms or conditions in DIRECTV's Customer Agreements, or to cancel her DIRECTV sendees.

18. Upon initially subscribing to DIRECTV service in September 2006, Ms. Imburgia obtained a DIRECTV DVR free of charge, in exchange for an agreement that she would purchase a certain level of DIRECTV programming for two years. Ms. Imburgia suspended her DIRECTV service between September 2007 and April 2008, and thus because she did not pay for programming during that period, those months did nol count towards the fulfillment of her programming commitment. In July 2008, Ms. Imburgia called DIRECTV and cancelled her DIRECTV service. Because she did so before fulfilling her agreement-to purchase programming

for two years, DIRECTV assessed a prorated early cancellation fee.

I declare under penalty of perjury under the jaws of the United States of America and the State of California that the foregoing statements are true and correct.

Executed on May 16, 2011, in El Segundo, California.

/s/ Valerie W. McCarthy
Valerie W. McCarthy

DIRECTV.

CUSTOMER AGREEMENT

Effective as of September 1, 2001 until replaced

THIS DOCUMENT DESCRIBES THE TERMS AND CONDITIONS REGARDING YOUR RECEIPT AND PAYMENT OF DIRECTV SERVICE (AS DESCRIBED IN SECTION 1, BELOW). IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR SERVICE. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND, ACCORDINGLY, THEY WILL BE LEGALLY BINDING ON YOU. TO VIEW THIS AGREEMENT IN SPANISH VISIT US AT DIRECTV.COM OR CALL 1-800-330-4922 TO REQUEST A PRINTED COPY. (VISITE A DIRECTV.COM O LLAME AL 1-800-330-4922 PARA SOLICITAR ESTE DOCUMENTO.)

CONTACTING DIRECTV

You may contact us 24 hours a day, any day of the year, by calling 1-800-531-5000 or by writing to:

DIRECTV, Inc.
Customer Service
P.O. Box 92800
Los Angeles, CA 90009

You can also visit our web site at DIRECTV.com.

Thank you for choosing DIRECTV for your television programming. Service. DIRECTV provides programming Service to residents of the United States. We do not provide Service to addresses outside of the United States. This is your copy of the Customer Agreement between DIRECTV and you as a customer of DIRECTV. Please keep it for your records.

CUSTOMER AGREEMENT

1. OUR SERVICE

These are the terms on which we will provide you digital satellite entertainment programming (referred to collectively as "Service").

(a) Program Choices. We offer a variety of programming packages (at least one of which you have already selected), sports subscriptions and pay per view programming available on a basis or order. All programming selections have their own rates, terms, and conditions, information about programming is available on our web sites at DIRECTV.com or DIRECTVSPORTS.com. These rates, terms and conditions are incorporated into this Agreement. Some Service is available only if you purchase and maintain a minimum level of programming or have your receiver(s) continuously connected to a land-based telephone line.

(b) Impulse Pay Per View. You may order pay per view Service by using your on-screen program guide and remote control unit, online at DIRECTV.com or by calling us. If you use to order a pay per view Service, a fee may apply (described in Section 2). To use your remote control to order pay per view Service, your receivers must be continuously connected to a land-based telephone line. In this way, information about the program that you order is transmitted via the telephone line. During the short transmission period, you may not be able to use the line for other purposes.

(c) Your Programming Choices. You may change your programming selection or nothing at. A fee may apply to each change described in Section 2). Some programming may be purchased in minimum blocks or any month or multiples of one month.

(d) Our Programming Changes. Many different and changing considerations affect the availability, cost and quality of programming and customer demand for it. Accordingly, we must reserve the unrestricted right to change, re-arrange, add or delete our programming packages, the selections in those packages, our prices, and any other Service we offer at any time. We will endeavor to notify you of any change that is within our reasonable control and its effective date in most cases, this notice will be about one month in advance. You always have the right to cancel your Service, in whole or in part, if you do not accept the change (see Section 5). If you cancel your Service, a deactivation fee (described in Section 2) may apply. Credits, if any, to your account will be issued as described in Section 5. If you do not cancel, your continued receipt of our Service will constitute your acceptance of the change.

(e) Access Card and "Receiving Equipment" You have been provided with a card/smart access card that is inserted into your receiver and (referred to as the "Access Card"). The Access Card and the "Receiving Equipment," which included a receiver unit, a satellite dish(s) unit, and a receiving antenna (dish), are necessary to receive our Service. The Access Card will work only in the Receiving Equipment that it came with. Access Cards are nontransferable and will at all times remain the exclusive property of DIRECTV. If you tell us that the original Access Card was lost, damaged, defective, or absent, we will replace it, as long as there is no evidence of unauthorized tampering with or modification of the Access Card and your account is in good standing. A replacement fee will apply (described in Section 2). Tampering with or other unauthorized modification of the Access Card is strictly prohibited and may result in criminal or civil action. DIRECTV reserves the right to cancel or replace the Access Card, and the card must be returned to DIRECTV upon request. If you do not return the Access Card to DIRECTV when you cancel your Service, you may be charged a fee as described in Section 2.

(f) Additional Receivers. If you add additional receivers to your account, you may purchase a separate authorization for each one. Or, if all your receivers are continuously connected to the same land-based phone line, we can "mirror" the programming from your primary receiver to your additional receivers and charge you only the additional receiver fee amount described in Section 2. Pay per view programming cannot be mirrored and can be viewed only on the receiver for which it is purchased.

(g) Phone Connections. Your receiver units must always be directly connected to a land-based telephone line to receive certain Service, such as sports subscriptions and your local regional access network, and to be authorized to order pay per view Services with your remote control. If it is not so connected, or if it is connected to a line other than the one you told us, or if the line is not performing according to our requirements, we may deactivate the applicable Service. If we do, you will still be responsible for all Services purchased through the date of deactivation. Your receiver units must also be connected to the same land-based telephone line in order to be eligible to pay the additional receiver fee rather than purchase a separate authorization for each additional receiver.

(h) Mobile Units. We provide Service to Receiving Equipment that is installed in mobile units such as campers, boats and other recreational vehicles. However, without a permanent, land-based phone connection, this Receiving Equipment is not eligible for the additional receiver discount described above, pay per view ordering with the remote control, or certain programming such as sessions sports subscriptions and local regional sports networks.

(i) Private Viewing. We provide Service only for your private non-commercial use in your home. The programming may not be viewed in areas open to the public or reserved for commercial establishments. You may not reproduce, transmit, or perform the programming, charge admission for its viewing, or transmit or distribute running accounts of it. You may not use any of our trademarks for any purpose. Notwithstanding the provisions of Section 8, we or any programming provider may proceed to vindicate all the foregoing against you and other responsible parties in any court of competent jurisdiction, under the rules and regulations of the Federal Communications Commission, and other applicable laws.

(j) Blackouts. Certain programming, we transmit, including some subscription Services, sports events and broadcast network Services, may be blacked out in your local broadcast area. Blackout restrictions are decided by the sports we plan and the other entities that own the local broadcast rights. You may visit our web site for more detailed information. If you circumvent or attempt to circumvent any of these blackouts, you may be subject to legal action.

(k) Loss or Receiving Equipment. You should notify us immediately if your Receiving Equipment is stolen or removed from your premises without your authorization. If you notify us within 3 days after such occurs, we will not charge you for any unauthorized use. In any case we will not charge you for unauthorized use occurring after we receive your notification.

(l) Transfer of Receiving Equipment. You should also notify us immediately if you sell or transfer your Receiving Equipment to someone else. We consider you the owner of the Receiving Equipment and the recipient of our programming unless and until you notify us otherwise. You may be liable for charges incurred in the use of your Receiving Equipment by others until you have notified us.

(m) Your Viewing Restrictions. It is your responsibility to impose any viewing restrictions on other family members or guests, as you deem appropriate. We are not responsible to you or anyone else based on the content of our programming.

(n) Change of Address. You must notify us immediately of any change in your name, mailing address, residence address, or telephone number.

2. PAYMENT

In return for receiving our Service, you promise to pay us as follows:

(a) Prepayments. You will pay in advance, at our rates in effect at the time, for all Service ordered by you or anyone who uses your Receiving Equipment with or without your permission, through all periods until the Service is canceled.

(b) Taxes. You will pay all taxes or other governmental fees and charges, if any, which are assessed based on your receipt of our Service.

(c) Administrative Fees. In order to current the basic charges, which apply to all customers, we charge fees that arise in specific circumstances only to those customers responsible for them. This list is not exclusive, and DIRECTV reserves the right to modify these fees or charge additional fees. Accordingly, you will pay the following fees when they are applicable:

(1) Additional Activation Fee. We may charge you a fee (no lesser of (i) up to $50.00; and (ii) the maximum amount permitted where applicable law) prior to or upon activation of your Service account.

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(7) *Access Card Replacement Fee.* If we have to replace the Access Card we may charge you a replacement fee of up to $150.00. If you return the old Access Card to us, you may receive partial credit to your account. If you request overnight delivery of the replacement Access Card, you must pay a shipping and handling fee of up to $15.00.

(8) *Additional Receiver Authorization Fee.* If you meet the qualifications described in Section 1(f), we may charge you a monthly fee of up to $4.00 for each additional receiver, rather than a full subscription fee on each additional receiver. This reduced rate is available only if all receivers are located at your residence and are communicably connected to the same land-based telephone line. If not, you will be responsible for the full amount of our programming charges for each receiver.

(9) *Administrative Late Fee.* If we do not receive your payment by the due date appearing on your bill, we may charge you an administrative late fee of the lesser of (i) up to $5.00 and (ii) the maximum amount permitted under applicable law per month or partial month until the delinquent amount is paid in full, subject to applicable law. This late fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature. You acknowledge that this fee is reasonably related to the actual expenses we incur due to late payment and may be subject to limitations set forth by law in your state.

(10) *Change of Service Fee.* If you change your Service package to a lower-priced package, we may charge you a fee the lesser of (i) up to $5.00 and (ii) the maximum amount permitted under applicable law.

(11) *Payment by Phone Fee.* If you elect to pay any outstanding balance over the telephone using your checking account, credit card, or any other payment option, we may charge you the lesser of (i) up to $5.00 and (ii) the maximum amount permitted under applicable law.

(12) *Deposits.* We may require that you provide a deposit prior to or upon the activation or reactivation of your Service, which we may apply against any unpaid amounts at any time. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.

(13) *Order Assistance Fee.* If you order a pay per view Service by calling us, instead of using the on-screen remote control ordering capability or ordering online, we may charge you a fee of up to $5.00 for each adult-oriented movie, event or other program so ordered, even if it is later cancelled.

(14) *Deactivation Fee.* If you cancel your Service or we deactivate your Service because of your failure to pay or for some other breach on your part, we may charge you a fee the lesser of (i) up to $15.00 and (ii) the maximum amount permitted under applicable law.

(15) *Duplicate Statement Fee.* If you request a duplicate statement, we may charge you a fee the lesser of (i) up to $1.75; and (ii) the maximum amount permitted under applicable law for each statement copy.

(16) *Ledger Request Fee.* If you request a payment ledger itemizing past payments on your account, we may charge you a fee the lesser of (i) up to $3.75; and (ii) the maximum amount permitted under applicable law.

(17) *Returned Payment Fee.* If any bank or other financial institution refuses to honor any payment, draft or instrument submitted for payment to your account, we may charge you a collection fee the lesser of (i) up to $25.00 ($15.00 for residence of West Virginia); and (ii) the maximum amount permitted under applicable law. You acknowledge that this fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expenses we incur due to unreimbursed payment.

(d) Billing Statements. We will send you a statement for each billing cycle (usually once every 30 days) unless you have a zero or nothing balance due, or a nothing credit balance, on your account at the end of a billing cycle. Supplements will show (1) payments, credits, purchases, and any other charges to your account, (2) the amount you owe us, and (3) the payment due date. If you elect to make automatic credit or debit card payments, you will not receive monthly statements unless you request that they be sent.

(e) Questions About Your Statement. If you think your statement is incorrect or if you need more information about it, contact us. We will respond to you, and try to resolve any complaints you have as promptly as we can. If you write to us, please include the following information:

your name and account number;

the dollar amount in question;

an explanation of why you believe there is an error;

any suggestions you may have for solving the problem;

if you need more information about an item, describe the item and what information you need.

If you have questions, call or write us as soon as possible. Please do not include correspondence with your payment; use the address on the first page of this agreement. In order for us to investigate the problem, you must contact us within 60 days of the date you receive the statement in question. Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible deactivation of Service.

(f) Payments. Except as otherwise permitted under applicable law, you agree that you will pay your statements by credit or debit card, electronic funds transfer payments or other such payment method as DIRECTV may designate. Due to the subjective nature of creditworthiness, we reserve the right to require pre-payment for any Service via cashier's check, money order, or credit card, regardless of some objective credit rating or any past practice. The outstanding balance is due in full each month. We may in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. Any "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us.

(g) If You Don't Pay On Time. We may deactivate your Service if you do not pay your statements on time, after any applicable grace period. If you purchased an annual subscription to any Service and your account is past due, we may convert your subscription to a monthly subscription. If so, we will prorate your subscription and amounts owed to us and will apply your pre-payments to past due amounts and any remaining credit to future obligations.

(h) Consumer Reporting Credit. In order to establish an account with us, you authorize us to inquire into your credit-worthiness (subject to Section 6) by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or nonpayment to credit reporting agencies.

(i) Collection Costs. You will pay us any costs we reasonably incur to collect amounts you owe us, including, without limitation, reasonable attorney's fees.

3. RECEIVING EQUIPMENT

We do not impose Receiving Equipment or any other equipment you may use to receive and display our programming. If you obtain your Receiving Equipment and any installs, parts and service from suppliers, we do not warrant these or any way whatsoever and are not in any way responsible for the statements, conditions, promises, or warranties of such suppliers. You should direct any complaints about Receiving Equipment to the supplier from which you obtained the Receiving Equipment and any repairs, parts and service.

4. CHANGES IN CONTRACT TERMS

Due to the evolving nature of the multi-channel video programming distribution industry, its competition and the requirements and costs of programming suppliers, we must reserve the right to change our programming and the terms on which we offer Service from time to time, as we believe appropriate, including our fees and charges. If we make any such changes, we will send you a notice describing them and their effective date, in the manner described in Section 8(a). You always have the right to cancel your Service in whole or in part at any time, and you may do so if you do not accept any such changed terms or changes in programming. If you do cancel, you may be charged a deactivation fee and issued a credit in accordance with Section 5. If you elect not to cancel your Service after receiving our notice of a change, your continued receipt of Service from us will constitute your acceptance of the changed terms. If you notify us that you do not accept such terms, then we may cancel your Service as provided in Section 5, as we cannot offer Service to different customers on different terms.

5. CANCELLATION

(a) Term. The term of this Agreement is indefinite and Service will continue until cancelled as provided herein. We will automatically renew Service that you subscribe to on a periodic basis, including monthly and annual subscriptions and seasonal sports subscriptions, as long as we continue to carry the Service, unless you notify us that you wish to cancel it.

(b) Your Cancellation. You may cancel Service by notifying us. You may be charged a deactivation fee as described in Section 2 and issued a credit as described below. Your notice is effective on the day we receive it. You will still be responsible for payment of all outstanding balances accrued through that effective date.

For Services sold only in blocks of one month or multiples of one month, if you cancel such Service, we will credit you only for full months not used. For example, if you subscribe for a year of such Service for January through December and then cancel on March 10, we will credit you for the subscription fees for April through December. However, we will not credit any fees for January through March. Additionally, we will not credit prepaid seasonal sports subscriptions after the season starts.

(c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, or breach any other material provision of this Agreement. In such case you will still be responsible for payment of all outstanding balances accrued through that effective date, including the deactivation fee described in Section 2. In addition, we may cancel your Service if you elect not to accept any changed terms described to you as provided in Section 4.

6. PERSONAL DATA

We collect personally identifiable information about our customers ("Personal Data"). The use and disclosure of this Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy Policy, by this Agreement. A copy of our Privacy Policy is available on our web site. We will also send you a copy if you send your written request to the address: DIRECTV Privacy Policy, P.O. Box 92550, Los Angeles, CA 90009.

7. LIMITS ON OUR RESPONSIBILITY

(a) Service Interruptions. Service may be interrupted from time to time for a variety of reasons. We are not responsible for any interruptions of Service that occur due to acts of God, severe weather or any other cause beyond our reasonable control. However, because we value our customers, for an interruption of a significant length of time that is within our reasonable control, upon your request we will provide what we reasonably determine to be a fair and equitable adjustment to your account to make up for such Service interruption. THIS WILL BE YOUR SOLE REMEDY AND OUR SOLE DUTY IN SUCH CASES.

(b) Disclaimer. EXCEPT AS EXPRESSLY PROVIDED HEREIN, WE MAKE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, REGARDING ANY SERVICE OR YOUR RECEIVING EQUIPMENT. ALL SUCH WARRANTIES OR REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT ARE DISCLAIMED.

(c) Limitation of Liability. WE ARE NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE RECEIVING EQUIPMENT OR ANY SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE. REGARDLESS OF THE CAUSE, OUR TOTAL LIABILITY FOR DAMAGES OR LOSSES TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE, WILL IN NO EVENT EXCEED THE AMOUNT THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. You may have greater rights than described above under your state's laws. You should consult them.

(d) Third-Party Services. You agree that this Agreement does not provide You and the Service does not include, any warranty services or other services that we might provide occasionally, including, without limitation, any firm-based or other warranty programs.

8. RESOLVING DISPUTES

In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim relating to this Agreement, any addendum, or your Service (referred to as a "Claim") will be resolved as follows:

(a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 8(d)) below) for at least 60 days after one of us notifies the other of a Claim in writing. You will send your notice to the address on the first page of this Agreement, and we will send our notice to your billing address.

(b) Formal Resolution. Except as provided in Section 8(d), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the Commercial Arbitration Rules of the American Arbitration Association that are in effect at the time the arbitration is initiated (referred to as the "AAA Rules") and under the rules set forth in this Agreement. If there is a conflict between the AAA Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL. If you initiate the arbitration, you agree to pay a fee of $125 or less and you tell us in writing, the amount that you would pay to initiate a lawsuit against us in the appropriate court of law in your state. We agree to pay any additional fee or deposit required by the American Arbitration Association in excess of your filing fee. We also agree to pay the costs of the arbitration proceeding up to a maximum of one-half day (four hours) of hearings. Other than, each we attorney's fees, witnesses or appeal to the arbitration and the costs of a proceeding that goes beyond one-half day will be paid in accordance with the AAA Rules. The arbitration will be held at a location within one hundred miles of your residence unless you and we both agree to another location. To start an arbitration, you or we must do the following things:

(i) Write a demand for arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered.

(ii) Send three copies of the demand for arbitration, plus the appropriate filing fee to:

American Arbitration Association
13455 Noel Road, Suite 1750
Dallas, Texas 75240-6636
(800) 426-6790

(iii) Send one copy of the demand for arbitration to the other party.

(c) Binding Rules. In the arbitration proceeding, the arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. A court may sever any portion of Section 8 that it finds to be unenforceable.

(d) Exceptions. Notwithstanding the foregoing: (i) any Claim listed in Section 1(f) above; and (ii) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, or any other analogous law governing Theft of Service, may be decided only by a court of competent jurisdiction.

9. MISCELLANEOUS

(a) Notice. Notices to you will be deemed given when deposited in the U.S. Mail and addressed to you at your last known address, hand delivered to you at your place of residence, or sent electronically via your DIRECTV email system. Mailed notices may be included in your statements to you. We may also provide notice to you by email or telephone, which will be deemed given when a message is left with you or someone answering the telephone at your residence. Your notices to us will be deemed given when we receive them at the address or telephone number set forth on the first page of this Agreement.

(b) Applicable Law. The implementation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 8 shall be governed by the Federal Arbitration Act.

(c) Assignment of Account. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including, without limitation, collection of unpaid amounts. In the event of an acquisition, corporate reorganization, merger or sale of substantially all of DIRECTV's assets to another entity, You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

(d) Other. No salesperson or other representative is authorized to supplement or change this Agreement, in no event shall this Agreement or any other agreement with DIRECTV be modified orally. If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary and the rest of the Agreement will remain enforceable. The terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU.

(3/04-ASSIGN 11/01)
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DIRECTV.

CUSTOMER AGREEMENT

Effective as of October 1, 2004, until replaced

THIS DOCUMENT DESCRIBES THE TERMS AND CONDITIONS REGARDING YOUR RECEIPT AND PAYMENT OF DIRECTV® SERVICE. IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR SERVICE. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND, ACCORDINGLY, THEY WILL BE LEGALLY BINDING ON YOU. TO VIEW THIS AGREEMENT IN SPANISH VISIT US AT DIRECTV.COM OR CALL 1-800-369-6822 TO REQUEST A PRINTED COPY. (VISITE A DIRECTV.COM [SOLAMENTE EN INGLÉS] O LLAME AL 1-800-369-6822 PARA SOLICITAR ESTE DOCUMENTO.)

CONTACTING DIRECTV:

You may contact us 24 hours a day, any day of the year, by calling 1-800-531-5000 or by writing to:

DIRECTV, Inc.
Customer Service
P.O. Box 78214
Boise, ID 83707-0114

You can also visit our Web site at DIRECTV.com.

If your bill for DIRECTV Service comes from a third party, such as a member or affiliate of the National Rural Telecommunications Cooperative (NRTC), please use the contact information provided on your bill for any questions about your DIRECTV Service.

Thank you for choosing DIRECTV. DIRECTV provides digital satellite entertainment programming (referred to collectively as "Service") to residents of the United States. We do not provide Service to addresses outside of the United States. This is your copy of the Customer Agreement between DIRECTV and you, as a customer of DIRECTV. Please keep it for your records.

CUSTOMER AGREEMENT

1. OUR SERVICE

These are the terms on which we will provide you Service:

(a) Program Choices. We offer a variety of programming packages, sports subscriptions and pay per view programming available on special order. You must subscribe to a base package in order to receive additional Services such as premium movie services or sports subscriptions. All programming selections have their own rates, terms, and conditions. Information about programming is available on our Web site at DIRECTV.com. Some Service is available only if you purchase and maintain a minimum level of programming or have your receiver(s) continuously connected to a land-based telephone line.

(b) Ordering Pay Per View. You may order pay per view Service by using your on-screen program guide and remote control unit, online at DIRECTV.com or by calling us. If you call to order or order online a fee may apply (described in Section 2). To use your remote control to order, your receiver must be continuously connected to a land-based telephone line. Your order is transmitted via the telephone line, and during the short transmission period, you may not be able to use the line for other purposes. Frequent or recurring cancellation of previously ordered pay per view Services may result in cancellation of your account, restrictions on your ability to order pay per view Services, or imposition of additional fees for pay per view Services ordered before cancellation.

(c) Your Programming Changes. You may change your programming selection by notifying us. A fee may apply to such changes (described in Sections 2 & 5(d)). Some programming may be purchased in minimum blocks of one month or multiples of one month.

(d) Our Programming Changes. Many different and changing considerations affect the availability, cost and quality of programming and customer demand for it. Accordingly, we must reserve the unrestricted right to change, rearrange, add or delete our programming packages, the selections in those packages, our prices, and any other Service we offer, at any time. We will endeavor to notify you of any change that is within our reasonable control and be effective date. In most cases, this notice will be about one month in advance. You always have the right to cancel your Service, in whole or in part, if you do not accept the change (see Section 6). If you cancel your Service, a deactivation fee (described in Sections 2 & 5(d)) may apply. Credits, if any, to your account will be posted as described in Section 5. If you do not cancel, your continued receipt of our Service will constitute acceptance.

(e) Access Card. You have received a conditional access card (referred to as the "Access Card") that is inserted into your receiver and a License Agreement governing your use of the Access Card while you are receiving our Service. Access Cards are non-transferable and will at all times remain the exclusive property of DIRECTV. If you tell us that the original Access Card was lost, damaged, defective or stolen, we will replace it, so long as there is no evidence of unauthorized tampering with or modification of the Access Card and your account is in good standing. A replacement fee may apply (described in Section 2). Tampering with or other unauthorized modification of the Access Card is strictly prohibited and may result in criminal or civil action. Tampering with or inserting any device into your receiver unit other than an authorized, unmodified Access Card is prohibited. DIRECTV reserves the right to replace or restore the Access Card, and the card must be returned to DIRECTV upon request. If you do not return the Access Card to DIRECTV when you cancel your Service, you may be charged a fee as described in Section 2. Requesting Access Cards on behalf of other persons or for purposes other than lawful viewing of DIRECTV Services is prohibited.

(f) Additional TVs. If you add separate Service on additional TVs, you may purchase a separate subscription for each TV. Or, if all your receivers are continuously connected to the same land-based phone line, we can "reserve" the programming to your additional TVs and charge you only the fee amount described in Section 2. Pay per view programming cannot be reserved and can be viewed only on the TV for which it is purchased. You agree to provide true and accurate information about the location of your receivers.

(g) Phone Connections. Your receiver units must always be directly connected to a land-based telephone line to receive certain Service, such as sports subscriptions and your local regional sports network, and to be authorized to order pay per view Services with your remote control. If it is not so connected, or if it is connected to a line other than the one you tell us, or if the line is not performing according to our requirements, we may deactivate the applicable Service. If we do, you will still be responsible for all Services purchased through the date of deactivation. Your receiver units must also be connected to the same land-based telephone line in order to be eligible to pay the additional TV fee (see 1(f)) rather than purchase a separate subscription for each additional TV.

(h) Mobile Units. We provide Service to Receiving Equipment that is installed in mobile units such as campers, boats and other recreational vehicles. However, without a permanent land-based phone connection, this Receiving Equipment is not eligible for the additional TV authorization discount described in 1(f), pay per view ordering with the remote control, or certain programming such as seasonal sports subscriptions and local regional sports networks.

(i) Private Viewing. We provide Service only for your private non-commercial use, enjoyment and home viewing. The programming may not be viewed in areas open to the public or received by commercial establishments. You may not rebroadcast, transmit, or perform the programming, charge admission for its viewing, or transmit or distribute running accounts of it. You may not use any of our trademarks for any purpose. Notwithstanding the provisions of Section 8, we or any programming provider may prosecute violations of the foregoing against you and other responsible parties in any court of competent jurisdiction under the rules and regulations of the Federal Communications Commission, and other applicable laws.

(j) Blackouts. Certain programming we transmit, including some subscription Services, sports events and broadcast network Services, may be blacked out in your local reception area. Blackout restrictions are decided by the sports leagues and the other entities that own the local broadcast rights. You may visit our Web site for more blackout information. If you circumvent or attempt to circumvent any of these blackouts, you may be subject to legal action.

(k) Loss of Receiving Equipment. You should notify us immediately if your receiver unit, remote control unit and receiving antenna dish (referred to collectively as "Receiving Equipment") is stolen or removed from your premises without your authorization. If you notify us within 3 days after such removal, we will not charge you for any unauthorized use. In any case, we will not charge you for unauthorized use occurring after we receive your notification.

(l) Transfer of Receiving Equipment. You should also notify us immediately if you sell or transfer your Receiving Equipment to someone else. We consider you the owner of the Receiving Equipment and the recipient of our programming unless and until you notify us otherwise. You may be liable for charges incurred in the use of your Receiving Equipment by others until you have notified us.

(m) Your Viewing Restrictions. It is your responsibility to impose any viewing restrictions on other family members or guests, as you think appropriate. We are not responsible to you or anyone else based on the content of our programming.

(n) Change of Address. You must notify us immediately of any change in your name, mailing address, residence address or telephone number.

2. PAYMENT

In return for receiving our Service, you promise to pay us as follows:

(a) Programming. You will pay in advance, at our rates in effect at the time, for all Service ordered by you or anyone who uses your Receiving Equipment, with or without your permission, through all periods until

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the Service is canceled. The outstanding balance is due in full each month. We may in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. No "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us. We may deactivate your Service if you do not pay your statements on time, after any applicable grace period. If you purchased an annual subscription to any Service and your account is past due, we may convert your subscription to a monthly subscription. If so, we will prorate your subscription and amounts owed to us and will apply your pre-payments to past due amounts and any remaining credit to future obligations.

(b) Taxes. You will pay all taxes or other governmental fees and charges, if any, which are assessed.

(c) Administrative Fees. In order to control the basic charges, which apply to all customers, we charge fees that arise in specific circumstances only to those customers responsible for them. The list is not exclusive, and DIRECTV reserves the right to modify these fees or charge additional fees. Accordingly, you will pay the following fees when they are applicable:

(1) *Account Activation Fee.* We may charge you a fee the lesser of: (I) up to $50.00; and (II) the maximum amount permitted under applicable law prior to or upon activation of your Service account.

(2) *Access Card Replacement Fee:* If you do not return the Access Card when requested to do so, or if we have to replace the Access Card, we may charge you a replacement fee of up to $999.00. If you return the old Access Card to us, you may receive partial credit to your account. If you request overnight delivery of the replacement Access Card, you must pay a shipping and handling fee of up to $15.00.

(3) *Additional TV Authorization Fee:* If you meet the qualifications described in Section 1(f), we may charge you a monthly fee of up to $4.99 for separate Services on each additional TV, rather than a full subscription fee for Services on each additional TV. This reduced rate is available only if all receivers are located at your residence and are continuously connected to the same land-based telephone line. If not, you will be responsible for the full amount of our programming charges for each TV.

(4) *Administrative Late Fee:* If we do not receive your payment by the due date appearing on your bill, we may charge you an administrative late fee of the lesser of (I) up to $5.00 and (II) the maximum amount permitted under and subject to applicable law per month or partial month until the delinquent amount is paid in full. The late fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature. You acknowledge that this fee is reasonably related to the actual expenses we incur due to late payment and may be subject to limitations set forth by law in your state.

(5) *Change of Service Fee:* If you change your Service package to a lower-priced package, we may charge you a fee the lesser of (I) up to $5.00 and (II) the maximum amount permitted under applicable law.

(6) *Check by Phone Fee:* If you elect to pay any outstanding balance over the telephone using your checking account, we may charge you the lesser of (I) up to $5.00; and (II) the maximum amount permitted under applicable law.

(7) *Deposits:* We may require that you provide a deposit prior to or upon the activation or reactivation of your Service, which we may apply against any unpaid amounts at any time. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.

(8) *Order-Assistance Fee:* If you order a pay per view Service (by calling us or ordering online), we may charge you a fee of up to $5.00 for each separate movie, event or other program so ordered, even if it is later canceled.

(9) *Deactivation Fee:* If you cancel your Service or we deactivate your Service because of your failure to pay or for some other breach on your part, we may charge you a fee the lesser of (I) up to $15.00; and (II) the maximum amount permitted under applicable law.

(10) *Duplicate Statement Fee:* If you request a duplicate statement, we may charge you a fee the lesser of (I) up to $1.75; and (II) the maximum amount permitted under applicable law for each statement copy.

(11) *Ledger Request Fee:* If you request a payment ledger itemizing past payments on your account, we may charge you a fee the lesser of (I) up to $2.75; and (II) the maximum amount permitted under applicable law.

(12) *Returned Payment Fee:* If any bank or other financial institution refuses to honor any payment, draft or instrument submitted for payment to your account, we may charge you a collection fee the lesser of (I) up to $25.00 ($15.00 for residents of West Virginia); and (II) the maximum amount permitted under applicable law. You acknowledge that this fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expenses we incur due to unsatisfied payment.

(d) Billing Statements. We will send you a statement for each billing cycle (usually once every 30 days) unless you have a zero or nominal balance due, or a nominal credit balance, on your account at the end of a billing cycle. Statements will show: (1) payments, credits, purchases and any other charges to your account; (2) the amount you owe us; and (3) the payment due date. If you elect to make automatic credit or debit card payments, you will not receive monthly statements unless you request that they be sent.

(e) Questions About Your Statement. If you think your statement is incorrect or if you need more information about it, contact us. We will respond to you and try to resolve any complaints you have as promptly as we can. If you write to us, please include the following information:

- your name and account number;
- the dollar amount in question;
- an explanation of why you believe there is an error;
- any suggestions you may have for solving the problem.

If you need more information about an item, describe the item and what information you need.

If you have questions, call or write us as soon as possible. Please do not include correspondence with your payment; use the address on the first page of this agreement. In order for us to investigate the problem, you must contact us within 60 days of the date you receive the statement in question. Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible deactivation of Service.

Remember, if your bill for DIRECTV Service comes from a third party (such as a member or affiliate of the NRTC), please use the contact information provided on your bill for any questions about your DIRECTV statement.

(f) Consumer Reporting Credit. In order to establish an account with us, you authorize us to inquire into your creditworthiness (subject to Section 6), by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or nonpayment to credit reporting agencies. Due to the subjective nature of creditworthiness, we reserve the right to require pre-payment for any Service via cashier's check, money order, or credit card, regardless of some objective credit rating or any past practice.

(g) Collection Costs. To the extent permitted by law, you will pay us any costs we reasonably incur to collect amounts you owe us, including, without limitation, reasonable attorney's fees.

3. CUSTOMER INFORMATION

(a) Representations. You represent that you are at least 18 years of age and a resident of the United States.

(b) Contact Information. You agree to provide true, accurate, current and complete contact information about yourself, and maintain and promptly update your contact information to keep it true, accurate and complete.

(c) Online Access. You are responsible for maintaining the confidentiality of the password and account username used for online billing services and account maintenance at DIRECTV.com, and are fully responsible for all activities that occur under your password and account. You agree to (I) keep your username and password confidential and not share them with anyone else; (II) immediately notify DIRECTV of any unauthorized use of your password and account or other breach of security; and (III) use only your username and password to log into DIRECTV.com.

4. CHANGES IN CONTRACT TERMS

We reserve the right to change the terms and conditions on which we offer Service. If we make any such changes, we will send you a copy of your new Customer Agreement containing its effective date. You always have the right to cancel your Service, in whole or in part at any time, and you may do so if you do not accept any such changed terms or conditions. If you do cancel, you may be charged a deactivation fee and issued a credit in accordance with Section 5. If you elect not to cancel your Service after receiving a new Customer Agreement, your continued receipt of Service from us will constitute acceptance of the changed terms and conditions. If you notify us that you do not accept such terms and conditions, then we may cancel your Service as provided in Section 5, as we cannot offer Service to different customers on different terms.

5. CANCELLATION

(a) Term. The term of this Agreement is indefinite and Service will continue until canceled as provided herein. WE WILL AUTOMATICALLY RENEW SERVICE THAT YOU SUBSCRIBE TO ON A PERIODIC BASIS, INCLUDING MONTHLY AND ANNUAL SUBSCRIPTIONS AND SEASONAL SPORTS SUBSCRIPTIONS, AS LONG AS WE CONTINUE TO CARRY THE SERVICE, UNLESS YOU NOTIFY US THAT YOU WISH TO CANCEL IT.

(b) Your Cancellation. You may cancel Service by notifying us. You may be charged a deactivation fee as described in Section 2 and issued a credit as described below. Your notice is effective on the day we receive it. You will still be responsible for payment of all outstanding balances accrued through that effective date. In addition to any deactivation or change of service fees provided in Section 2, if you cancel Service or change your Service package you may be subject to a prorated fee of up to $150.00 if you have entered into a separate annual programming commitment with DIRECTV, and have failed to maintain the required programming package for the required period of time.

For Services sold only in blocks of one month or multiples of one month, if you cancel such Service, we will credit you only for full months not used. For example, if you subscribe for a year of such Service for January through December and then cancel on March 10, we will credit you for the subscription fees for April through December. However, we will not credit any fees for January through March. Additionally, we will not credit prepaid seasonal sports subscriptions after the season starts.

(c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, or breach any other material provision of this Agreement. In such case, you will still be responsible for payment of all outstanding balances accrued through that effective date, including the deactivation fee described in Section 2. In addition, we may cancel your Service if you elect not to accept any changed terms described to you, as provided in Section 4.

8. PERSONAL DATA

We collect personally identifiable information about our customers ("Personal Data"). The use and disclosure of the Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy Policy, by this Agreement. A copy of our Privacy Policy is available on our Web site. We will also send you a copy if you send your written request to this address: DIRECTV Privacy Policy, P.O. Box 70014, Boise, ID 83707-0014.

7. DIRECTV® DVR SERVICE

DIRECTV DVR Service gives you the ability to see and record televised programs ("Third Party Content"). You understand that DIRECTV does not guarantee the access to or recording of any particular program, or the length of time any particular recorded program may remain available for your viewing. You also understand that Third Party Content is the copyrighted material of the third party that supplies it, is protected by copyright and other applicable laws, and may not be reproduced, published, broadcast, rewritten or redistributed without the written permission of the third party that supplied it, except to the extent allowed under the "fair use" provisions of the U.S. copyright laws or comparable provisions of foreign laws. You agree that DIRECTV will have no liability to you, or anyone else who uses your DIRECTV DVR Service, with regard to any Third Party Content. DIRECTV may, at its discretion, from time to time change, add or remove features of the DIRECTV DVR Service, or change the service fee for DIRECTV DVR Service.

We primarily use local telephone calls to provide the DIRECTV DVR Service. You are responsible for such telephone charges and acknowledge and agree that you shall be solely responsible for all disputes with any telephone company related to the same.

If you paid a "lifetime service fee," you will not be charged a fee for your DIRECTV DVR Service as long as you maintain television programming service from DIRECTV on the same account. If you disconnect your DIRECTV television programming service and later reconnect on the same account, your DIRECTV DVR service will be reconnected and you will not be charged a fee for DIRECTV DVR Service.

By receiving the DIRECTV DVR Service, you agree to the following license. The term "Software" shall include any upgrades, modified versions, additions and copies of certain software for the DIRECTV DVR Service or your DIRECTV Digital Satellite Recorder that may be provided by DIRECTV from time to time. The term "End User Documentation" shall mean the documentation and related explanatory written materials provided to you, in connection with licensing by you, of any Software. DIRECTV grants to you a non-exclusive license to use the Software, provided that you agree to the following:

(a) License Grant. You may use the Software solely in executable code form and solely in conjunction with the DIRECTV Digital Satellite Recorder that you purchased.

(b) Restrictions. You may not copy, modify or transfer the Software, or any copy thereof, in whole or in part. You may not reverse engineer, disassemble, decompile or translate the Software, or otherwise attempt to derive the source code of the Software, except to the extent allowed under any applicable law. Any attempt to transfer any of the rights, duties or obligations of this license agreement is void. You may not rent, lease, load, resell for profit or distribute the Software, or any part thereof.

(c) Ownership. The Software is licensed, not sold, to you for use only under the terms of this license agreement, and DIRECTV and its suppliers reserve all rights not expressly granted to you. You shall own the media, if any, on which Software or End User Documentation is recorded, but DIRECTV and its suppliers retain ownership of all copies of the Software itself.

(d) Reservation of Rights. Except as stated above, this license agreement does not grant to you any intellectual property rights in the Software.

(e) Term. If you breach any term or condition of this license agreement, this license agreement will terminate immediately upon notice to you.

(f) Warranty Disclaimer. NEITHER DIRECTV, NOR ANY OF ITS REPRESENTATIVES MAKES OR PASSES ON TO YOU, OR OTHER THIRD PARTY ANY WARRANTY OR REPRESENTATION ON BEHALF OF DIRECTV OR ITS SUPPLIERS (INCLUDING TIVO) WITH RESPECT TO THE SOFTWARE, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS.

(g) Limitation of Liability. IN NO EVENT WILL DIRECTV OR ITS SUPPLIERS BE LIABLE TO YOU WITH RESPECT TO THE SOFTWARE FOR ANY CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, INCLUDING LOST PROFITS OR LOST SAVINGS, EVEN IF DIRECTV OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY ANY THIRD PARTY. Some states or jurisdictions do not allow the exclusion or limitation of incidental, consequential or special damages, so the above limitations may not apply to you.

(h) Third-Party Beneficiary. DIRECTV and you expressly acknowledge and agree that TiVo, Inc., a Delaware corporation with its principal place of business at 2160 Gold Street, Alviso, CA 95002, is an intended third-party beneficiary of this license agreement to the extent that the license agreement contains provisions that relate to your use of the Software licensed hereby. Such provisions are made expressly for the benefit of TiVo and are enforceable by TiVo in addition to DIRECTV.

9. LIMITS ON OUR RESPONSIBILITY

(a) Service Interruptions. Service may be interrupted from time to time for a variety of reasons. We are not responsible for any interruptions of Service that occur due to acts of God, power failure or any other cause beyond our reasonable control. However, because we value our customers, for an interruption of a significant length of time that is within our reasonable control, upon your request we will provide what we reasonably determine to be a fair and equitable adjustment to your account to make up for such Service interruption. THIS WILL BE YOUR SOLE REMEDY AND OUR SOLE DUTY IN SUCH CASES.

(b) Disclaimer. EXCEPT AS EXPRESSLY PROVIDED HEREIN, WE MAKE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, REGARDING ANY SERVICE OR YOUR RECEIVING EQUIPMENT. ALL SUCH WARRANTIES OR REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT ARE DISCLAIMED.

(c) Limitations of Liability. WE ARE NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE RECEIVING EQUIPMENT OR ANY SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE, REGARDLESS OF THE CAUSE. OUR TOTAL LIABILITY FOR DAMAGES OR LOSSES TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE, WILL IN NO EVENT EXCEED THE AMOUNT THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. You may have greater rights than described above under your state's laws. You should consult them.

(d) Warranty Services. You agree that this Agreement does not provide for, and the Service does not include, any warranty services or other services that we might provide separately, including, without limitation, any fee-based or other warranty programs.

8. RESOLVING DISPUTES

In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim relating to this Agreement, any added-on, or your Service (referred to as a "Claim") will be resolved as follows:

(a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 9(d) below) for at least 60 days after [redacted] of us notifies the other of a Claim in writing. You will send your notice to the address on the first page of this Agreement, and we will send our notice to your billing address.

(b) Formal Resolution. Except as provided in Section 9(d), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated (referred to as the "JAMS Rules") and under the rules set forth in this Agreement. If there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL. You may, in arbitration, seek any and all remedies otherwise available to you pursuant to your state's law. If you initiate the arbitration, you agree to pay a fee of $125.00 or, if less and you tell us in writing, the amount that you would pay to initiate a lawsuit against us in the appropriate court of law in your state. We agree to pay any additional fee or deposit required by JAMS in excess of your filing fee. We also agree to pay the costs of the arbitration proceeding. Other fees, such as attorney's fees and expenses of travel to the arbitration will be paid in accordance with JAMS Rules. The arbitration will be held at a location in your hometown area unless you, and we both agree to another location. To start an arbitration, you or we must: do the following things:

(1) Write a Demand for Arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered. You can find a copy of a Demand for Arbitration at jamsadr.com.

(2) Send three copies of the Demand for Arbitration, plus the appropriate filing fee to:

JAMS
500 North State College Blvd., Suite 600
Orange, CA 92868
1-800-352-5267

(3) Send one copy of the demand for arbitration to the other party.

(c) Special Rules. In the arbitration proceeding, the arbitrator must follow applicable law, and any award may be challenged if the arbitrator fails to do so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. In the event JAMS adopts, or modifies its existing rules to provide for class action proceedings, you and we agree to waive application of such rules. Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in private attorney general capacity. A court may sever any portion of Section 9 that is found to be unenforceable, except for the prohibition on class or representative arbitration.

(d) Exceptions. Notwithstanding the foregoing: (1) any Claim listed on Section 1(f) above; and (2) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 or any other statement or law governing theft of service, may be decided only by a court of competent jurisdiction.

10. MISCELLANEOUS

(a) Notice. Notices to you will be deemed given when personally delivered, addressed to you at your last known address and Dispatched in the U.S. Mail (which may include inclusion in your monthly billing statement), sent electronically via your DIRECTV email system, or delivered telephonically, deemed given when a message is left at your residential telephone number on your account. Your notices to us will be deemed given when we receive them at the address or telephone number set forth on the first page of this Agreement.

(b) Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

(c) Assignment of Account. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including, without limitation, collection of unpaid amounts, or in the event of an acquisition, corporate reorganization, merger or sale of substantially all of the party's assets to another entity. You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

(d) Other. This agreement and any activation or programming commitment agreement that you signed constitute our entire agreement. No salesperson or other representative is authorized to change it. If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable. The terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU.

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DIRECTV®

CUSTOMER AGREEMENT

Effective as of May 1, 2006, until replaced

THIS DOCUMENT DESCRIBES THE TERMS AND CONDITIONS OF YOUR RECEIPT AND PAYMENT OF DIRECTV® SERVICE AND IS SUBJECT TO ARBITRATION (SECTION 9). IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR SERVICE. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THEY WILL BE LEGALLY BINDING. TO VIEW THIS AGREEMENT IN SPANISH VISIT DIRECTV.COM/ACUERDO OR CALL 1-888-388-4822 TO REQUEST A PRINTED COPY. (VISITE A DIRECTV.COM/ACUERDO O LLAME AL 1-888-388-4822 PARA SOLICITAR ESTE DOCUMENTO.)

CONTACTING DIRECTV:

You may contact us 24 hours a day, any day of the year, by calling 1-800-531-5000 or by writing to:

DIRECTV, Inc.
Customer Service
P.O. Box 29079
Glendale, CA 91209-9079

You can also visit our website at DIRECTV.com.

If your bill for DIRECTV Service comes from a party other than DIRECTV, please use the contact information provided on your bill for any questions about your DIRECTV Service.

Thank you for choosing DIRECTV. DIRECTV provides digital satellite entertainment programming and services (referred to collectively as "Service") to residents of the United States. We do not provide Service to addresses outside of the United States.

CUSTOMER AGREEMENT

1. OUR SERVICE

These are the terms on which we will provide you Service and other services:

(a) Programming Choices. You must subscribe to a base package in order to receive additional Services such as premium movie services or sports subscriptions. All programming selections have their own prices, terms and conditions. Information about programming is at DIRECTV.com.

(b) Ordering Pay Per View. You may order pay per view Services by using your on-screen guide and remote control, at DIRECTV.com or by calling us. If you call to order or order online, a fee may apply (described in Section 2). To use your remote control to order, your receiver must be continuously connected to a land-based telephone line. Your online is transmitted via the telephone line and during the short transmission period you may not be able to use the line for other purposes. Repeated cancellation of previously ordered pay per view Services may result in cancellation of your account, restrictions on your ability to order pay per view Services, or imposition of additional fees for pay per view Service.

(c) Your Programming Changes. You may change your programming selection by notifying us. A fee may apply to such changes (described in Sections 2 & 5(b)). Some programming may be purchased in minimum blocks of one month or multiples of one month.

(d) Our Programming Changes. Many changing considerations affect the availability, cost and quality of programming and customer demand for it. Accordingly, we must reserve the unrestricted right to change, rearrange, add or delete our programming packages, the selections in those packages, our prices, and any other Service we offer, at any time. We will endeavor to notify you of any change that is within our reasonable control and its effective date. In most cases, this notice will be about one month in advance. You always have the right to cancel your Service, in whole or in part, if you do not accept the change (see Section 5). If you cancel your Service, a deactivation fee (described in Sections 2 & 5(b)) or other charges may apply. Credits, if any, to your account will be posted as described in Section 5. If you do not cancel, your continued receipt of our Service will constitute acceptance.

(e) Access Card. You have received a conditional access card (referred to as the "Access Card") and a License Agreement governing your use of the Access Card while you are receiving our Service. Access Cards are non-transferable and are the exclusive property of DIRECTV. If you tell us that the original Access Card was lost, damaged, defective or stolen, we will replace it, so long as there is no evidence of unauthorized tampering with or modification of the Access Card and your account is in good standing. A replacement fee may apply (described in Section 2). Tampering with or other unauthorized modification of the Access Card is strictly prohibited and may result in criminal or civil action. Tampering with or inserting any device into your receiver other than an authorized connected Access Card is prohibited. DIRECTV reserves the right to cancel or replace the Access Card. Upon request, the card must be returned to DIRECTV. If you do not return the Access Card to DIRECTV when you cancel your Service, you may be charged a fee as described in Section 2. Requesting Access Cards on behalf of other persons or for purposes other than lawful viewing of DIRECTV Service is prohibited.

(f) Additional TVs. If you add separate Service on additional TVs, you may purchase a separate subscription for each TV. Or, if all your receivers are continuously connected to the same land-based phone line, we can "mirror" the programming to your additional TVs and charge you only the fee amount described in Section 2. Pay per view programming ordered by remote control cannot be mirrored and can be viewed only on the TV for which it is purchased. You agree to provide true and accurate information about the location of your receivers.

(g) Phone Connections. Your receiver must always be directly connected to a land-based telephone line to receive certain Service, such as sports subscriptions and your local regional sports services network, and to be authorized to order with your remote control. If it is not so connected, or if it is connected to a line other than the one you tell us, or if the line is not performing according to our requirements, we may deactivate the applicable Service. If we do, you will still be responsible for all Services purchased through the date of deactivation. Your receivers must also be connected to the same land-based telephone line in order to be eligible to pay the additional TV fee (see 1(f)) rather than purchase a separate subscription for each additional TV.

(h) Mobile Units. We provide Service to Receiving Equipment installed in mobile units such as campers, boats and other recreational vehicles. However, without a permanent land-based phone connection, the Receiving Equipment is not eligible for the additional TV authorization discount described in 1(f), ordering with the remote control, or certain sports programming described in 1(g).

(i) Private Viewing. We provide Service only for your private non-commercial use, enjoyment and home viewing. The programming may not be viewed in areas open to the public or in commercial establishments. You may not redistribute, transmit or perform the programming, charge admission for the viewing or transmit or distribute running accounts of it. You may not use any of our trademarks. Notwithstanding the provisions of Section 9, we or any programming provider may prosecute violations of the foregoing against you and other responsible parties in any court of competent jurisdiction under the rules and regulations of the Federal Communications Commission and other applicable laws.

(j) Blackouts. Certain programming, including sports events, may be blacked out in your local reception area. Blackout restrictions are decided by the sports leagues and the other entities that own the local broadcast rights. You may visit DIRECTV.com for more blackout information. If you circumvent or attempt to circumvent any of these blackouts, you may be subject to legal action.

(k) Loss of Receiving Equipment. You should notify us immediately if your receiver, remote control or receiving antenna dish (referred to collectively as "Receiving Equipment") is lost or stolen. If you notify us within 5 days, we will not charge you for unauthorized use. In any case, we will not charge you for unauthorized use occurring after we receive your notice. For leased Receiving Equipment, non-return fees as specified in the Equipment Lease Addendum will apply.

(l) Transfer of Receiving Equipment. We consider you to be responsible for and the recipient of programming on, any Receiving Equipment you own. You are liable for charges incurred in the use of your Receiving Equipment by others until you notify us of a transfer. Leased Receiving Equipment may not be transferred.

(m) Your Viewing Restrictions. It is your responsibility to impose any viewing restrictions on other family members or guests, as you think appropriate. We are not responsible to you or anyone else based on the content of our programming. Please visit DIRECTV.com for information on parental controls, locks and limits and password protection on your account.

(n) Change of Address. You must notify us immediately of any change in your name, mailing address, residence address or telephone number.

2. PAYMENT

In return for receiving our Service, you promise to pay us as follows:

(a) Programming. You will pay in advance, at our rates in effect at the time, for all Service ordered by you or anyone who uses your Receiving Equipment, with or without your permission, until the Service is canceled. The outstanding balance is due in full each month. We may, in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. No "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us. We may reduce your service to a minimum service level, at our rates in effect at the time, or deactivate your Service if you do not pay your statements on time, after any applicable grace period.

(b) Taxes. You will pay all taxes or other governmental fees and charges, if any, which are assessed.

(c) Administrative Fees. In order to control the basic charges, which apply to all customers, we charge fees that arise in specific circumstances.

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only to those customers responsible for them. This list is not exclusive, and DIRECTV reserves the right to modify these fees or charge additional fees. Accordingly, you will pay the following fees when they are applicable:

(1) *Account Activation Fee:* We may charge you a fee of: (i) up to $35.00; or (ii) the maximum amount permitted under applicable law prior to or upon activation of your Service account, whichever is less.

(2) *Access Card Replacement Fee:* If you do not return the Access Card when requested to do so, or if we have to replace the Access Card, we may charge you a replacement fee of up to $285.00, if you return the old Access Card to us, you may receive partial credit to your account. If you request overnight delivery of the replacement Access Card, you must pay a shipping and handling fee of up to $14.99.

(3) *Additional TV Authorization Fee:* If you meet the qualifications described in Section 1(f), we may charge you a monthly fee of up to $4.99 for separate Services on each additional TV, rather than a full subscription fee for Services on each additional TV. This reduced rate is available only if all receivers are located at your residence and are continuously connected to the same land-based telephone line. If not, you will be responsible for the full amount of our programming charges for each TV.

(4) *Administrative Late Fee:* If we do not receive your payment by the due date on your bill, we may charge you an administrative late fee of the lesser of (i) up to $5.00; or (ii) the maximum amount permitted under and subject to applicable law per month or partial month until the delinquent amount is paid in full. This late fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature. You acknowledge that this fee is reasonably related to the actual expense we incur due to late payment and may be subject to limitations set forth by law in your state.

(5) *Charge of Service Fee:* If you change your Service package to a lower-priced package, we may charge you a fee the lesser of (i) up to $10.00; or (ii) the maximum amount permitted by applicable law.

(6) *Phone Payment Fee:* If you elect to pay any outstanding balance over the telephone we may charge you the lesser of (i) up to $5.99; or (ii) the maximum amount permitted by applicable law.

(7) *Deposits:* We may require that you provide a deposit prior to or after activation of your Service, which we may apply against any unpaid amounts at any time. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.

(8) *Order-Assistance Fee:* If you order a pay per view Service by calling us or online, we may charge you a fee of up to $5.00 for each separate movie, event or other program so ordered, even if it is later canceled.

(9) *Deactivation Fee:* If you cancel your Service or we deactivate your Service because of your failure to pay or for some other breach on your part, we may charge you a fee the lesser of (i) up to $14.00; or (ii) the maximum amount permitted by applicable law.

(10) *Duplicate Statement Fee:* If you request a duplicate statement, we may charge you a fee the lesser of (i) up to $1.75; or (ii) the maximum amount permitted by applicable law for each statement copy.

(11) *Ledger Request Fee:* If you request a payment ledger itemizing past payments on your account, we may charge you a fee the lesser of (i) up to $2.75; or (ii) the maximum amount permitted by applicable law.

(12) *Returned Payment Fee:* If any bank or other financial institution refuses to honor any payment, draft or instrument submitted for payment to your account, we may charge you a fee the lesser of (i) up to $25.00; or (ii) the maximum amount permitted by applicable law. You acknowledge that this fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expense we incur due to unsatisfied payment.

(c) Billing Statements. We will send you a statement for each billing cycle (usually once every 30 days) unless you have a zero or nominal balance due, or a nominal credit balance, on your account at the end of a billing cycle. Statements will show: (1) payments, credits, purchases and any other charges to your account; (2) the amount you owe us and (3) the payment due date. If you elect to make automatic credit or debit card payments, you will not receive monthly statements unless you request that they be sent.

(d) Questions About Your Statement. If you think your statement is incorrect or if you need more information about it, contact us immediately. We will try to resolve any complaints you have as promptly as we can.

Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible reduction or deactivation of Service.

Remember, if your bill for DIRECTV Service comes from a party other than DIRECTV please use the contact information on your bill.

(e) Consent Regarding Credit. In order to establish an account with us, you authorize us to inquire into your creditworthiness (subject to Section 6), by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or nonpayment to credit reporting agencies. Due to the subjective nature of creditworthiness, we reserve the right to require prepayment for any Service via cashier's check, money order or credit card, notwithstanding your credit rating, past history or practice.

(f) Collection Costs. To the extent permitted by law, you will pay us any costs and fees we reasonably incur to collect amounts you owe us.

3. CUSTOMER INFORMATION

(a) Representations. You represent that you are at least 18 years of age and a resident of the United States.

(b) Contact Information. You agree to provide true, accurate, current and complete contact information about yourself, and maintain and promptly update your contact information to keep it true, accurate and complete.

(c) Online Access. You are responsible for maintaining the confidentiality of the password and account username used for online billing and account maintenance at DIRECTV.com, and are fully responsible for all activities that occur under your password and account. You agree to: (i) keep your username and password confidential and not share them with anyone else; (ii) immediately notify DIRECTV of any unauthorized use of your password and account or other breach of security and (iii) use only your username and password to log into DIRECTV.com.

4. CHANGES IN CONTRACT TERMS

We reserve the right to change the terms and conditions on which we offer Service. If we make any such changes, we will send you a copy of your new Customer Agreement containing its effective date. You always have the right to cancel your Service, in whole or in part at any time, and you may do so if you do not accept any such changed terms or conditions. If you do cancel you may be charged an early cancellation fee if you entered into a separate programming commitment or a deactivation fee. You will be issued a credit, if any, in accordance with Section 5. If you elect not to cancel your Service after receiving a new Customer Agreement, your continued receipt of Service from us will constitute acceptance of the changed terms and conditions. If you notify us that you do not accept such terms and conditions, then we may cancel your Service as provided in Section 5, as we cannot offer Service to different customers on different terms.

5. CANCELLATION

(a) Term. The term of this Agreement is indefinite and Service will continue until canceled as provided herein, UNLESS YOU NOTIFY US THAT YOU WISH TO CANCEL IT, WE WILL AUTOMATICALLY RENEW SERVICE THAT YOU SUBSCRIBE TO ON A PERIODIC BASIS, INCLUDING ANY MONTHLY OR ANNUAL SUBSCRIPTIONS AND SEASONAL SPORTS SUBSCRIPTIONS, AS LONG AS WE CONTINUE TO CARRY THE SERVICE.

(b) Your Cancellation. You may cancel Service by notifying us. You may be charged a deactivation fee as described in Section 2 and issued a credit as described below. Your notice is effective on the day we receive it. You will still be responsible for payment of all outstanding balances accrued through that effective date. In addition to any deactivation or change of service fees provided in Section 2, if you cancel Service or change your Service package, you may be subject to an early cancellation fee if you entered into a separate programming commitment with DIRECTV in connection with obtaining Receiving Equipment, and have failed to maintain the required programming package for the required period of time.

For Services sold only in blocks of one month or multiples of one month, if you cancel such Service, we will credit you only for full months not used. For example, if you subscribe for a year of such Service from January through December but cancel on March 10, we will credit you for the subscription fees for April through December. However, we will not credit any fees for January through March. Additionally, we will not credit seasonal sports subscriptions after the season starts.

(c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, breach any other material provision of this Agreement, or act dishonestly toward our staff. In such case, you will still be responsible for payment of all outstanding balances accrued through that effective date, including the deactivation fee described in Section 2. In addition, we may cancel your Service if you elect not to accept any changed terms described to you, as provided in Section 4.

(d) Credit Balances. If you have a credit balance after the close of your account and issuance of the final bill, we will automatically issue you a refund. However, if your credit balance is less than $1.00, we will not issue you a refund unless you make a written request for the refund. If you do not make such a written request for the refund within one year of the close of your account, you forfeit any credit balance remaining on your account and your account balance will be reset to zero.

6. PERSONAL DATA

We collect Personally Identifiable Information about our customers ("Personal Data"). The use and disclosure of this Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy Policy, by this Agreement. A copy of our Privacy Policy is available at DIRECTV.com. We will also send you a copy if you send your written request to the address: DIRECTV Privacy Policy P.O. Box 216070, Sherelee, CA 91309-9070.

7. DIRECTV® DVR SERVICE

DIRECTV DVR Service is a separately sold service at our rates in effect at the time, available to customers with DVR-enabled Receiving Equipment. DIRECTV DVR Service gives you the ability to see and record televised programs ("Third Party Content"). You understand that DIRECTV does not guarantee the access to or recording of any particular program or the length of time any particular recorded program may remain available for your viewing. You also understand that Third Party Content is the copyrighted material of the third party that supplies it, is protected by copyright and other applicable laws, and may not be reproduced, published, broadcast, rewritten or redistributed without the written permission of the third party that supplied it, except to the extent allowed under the "fair use" provisions of the U.S. copyright laws or comparable provisions of foreign laws. You agree that DIRECTV will have no liability to you, or anyone else who uses your DIRECTV DVR Service, with regard to any Third Party Content. DIRECTV may, at its discretion, from time to time change, add or remove features of the DIRECTV DVR Service, or change the service fee for DIRECTV DVR Service.

We generally use local telephone calls to provide the DIRECTV DVR Service. You are responsible for such telephone charges and acknowledge and agree that you shall be solely responsible for all disputes with any telephone company related to the same.

If you, paid a "lifetime service fee," you will not be charged a fee for your DIRECTV DVR Service as long as you maintain television programming service from DIRECTV on the same account. If you disconnect your DIRECTV television programming service and later reconnect on the same account, your DIRECTV DVR Service will be reconnected and you will not be charged a fee for DIRECTV DVR Service.

By receiving the DIRECTV DVR Service, you agree to the following license. The term "Software" shall include any updates, modified versions, attributes and copies of certain software for the DIRECTV DVR Service (or your Receiving Equipment) that may be provided by DIRECTV from time to time. The term "End User Documentation" shall mean the documentation and related explanatory written materials provided to you in connection with licensing by you of any Software. DIRECTV grants to you a non-exclusive license to use the Software, provided that you agree to the following:

(a) License Grant. You may use the Software solely in executable code form and solely in conjunction with the use of your Receiving Equipment.

(b) Restrictions. You may not copy, modify, translate, disseminate or publish the Software, or any copy thereof, in whole or in part. You may not reverse engineer, disassemble, decompile or translate the Software, or otherwise attempt to derive the source code of the Software, except to the extent allowed under any applicable law. Any attempt to transfer any of the rights, duties or obligations of this license agreement is void. You may not rent, lease, load, resell for profit or distribute the Software, or any part thereof.

(c) Ownership. The Software is licensed, not sold, to you solely for your use under the terms of this license agreement, and DIRECTV and its suppliers reserve all rights not expressly granted to you. You also own the media, if any, on which Software or End User Documentation is recorded, but DIRECTV and its suppliers retain ownership of all copies of the Software itself.

(d) Reservation of Rights. Except as stated above, this license agreement does not grant to you any intellectual property rights in the Software.

(e) Term. If you breach any term or condition of this license agreement, this license agreement will terminate immediately upon notice to you.

(f) Warranty Disclaimer. NEITHER DIRECTV, NOR ANY OF ITS REPRESENTATIVES MAKES OR PASSES ON TO YOU OR OTHER THIRD PARTIES ANY WARRANTY OR REPRESENTATION ON BEHALF OF DIRECTV OR ITS SUPPLIERS (INCLUDING TWO) WITH RESPECT TO THE SOFTWARE, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS.

(g) Limitation of Liability. IN NO EVENT WILL DIRECTV OR ITS SUPPLIERS BE LIABLE TO YOU WITH RESPECT TO THE SOFTWARE FOR ANY CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, INCLUDING LOST PROFITS OR LOST SAVINGS, EVEN IF DIRECTV OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY ANY THIRD PARTY. Some states or jurisdictions do not allow the exclusion or limitation of incidental, consequential or special damages, so the above limitations may not apply to you.

(h) Third-Party Beneficiary. DIRECTV and you expressly acknowledge and agree that TiVo, Inc., a Delaware corporation with its principal place of business at 2160 Gold Street, Alviso, CA 95002, is an intended third-party beneficiary of this license agreement as it relates to the software that may be contained in the Receiving Equipment. These license provisions are made expressly for the benefit of TiVo and are enforceable by TiVo in addition to DIRECTV.

8. LIMITS ON OUR RESPONSIBILITY

(a) Service Interruptions. Service may be interrupted from time to time for a variety of reasons. We are not responsible for any interruptions of Service that occur due to acts of God, power failure or any other cause beyond our reasonable control. However, because we value our customers, for an interruption of a significant length of time that is within our reasonable control, upon your request we will provide what we reasonably determine to be a fair and equitable adjustment to your account to make up for such Service interruption. THIS WILL BE YOUR SOLE REMEDY AND OUR SOLE DUTY IN SUCH CASES.

(b) Disclaimers. EXCEPT AS EXPRESSLY PROVIDED HEREIN, WE MAKE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, REGARDING ANY SERVICE OR YOUR RECEIVING EQUIPMENT. ALL SUCH WARRANTIES OR REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT ARE DISCLAIMED.

(c) Limitations of Liability. WE ARE NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE RECEIVING EQUIPMENT OR ANY SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE, REGARDLESS OF THE CAUSE. OUR TOTAL LIABILITY FOR DAMAGES OR LOSSES TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE, WILL IN NO EVENT EXCEED THE AMOUNT THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. You may have greater rights than described above under your state's laws. You should consult them.

(d) Warranty Services. You agree that this Agreement does not provide for, and the Service does not include, any warranty services or other services that we might provide separately, including, without limitation, any fee-based or other warranty programs.

9. RESOLVING DISPUTES

In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim relating to this Agreement, any addendum or your Service (referred to as a "Claim") will be resolved as follows:

(a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 9(c) below) for at least 60 days after one of us notifies the other of a Claim in writing. You will send your notice to the address on the first page of this Agreement, and we will send our notice to your billing address.

(b) Formal Resolution. Except as provided in Section 9(d), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated (referred to as the "JAMS Rules") and under the rules set forth in this Agreement. If there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL. You may, in arbitration, seek any and all remedies otherwise available to you pursuant to your state's law. If you decide to initiate arbitration, you agree to tell us in writing the amount that you would pay to file a lawsuit against us in the appropriate court of law in your state. Unless we agree to pay your fee for you, you only need to pay an arbitration initiation fee equal to such court filing fee, not to exceed $125; we agree to pay any additional fee or deposit required by JAMS to initiate your arbitration. We also agree to pay the costs of the arbitration proceeding. Other fees, such as attorney's fees and expenses of travel to the arbitration will be paid in accordance with JAMS Rules. The arbitration will be held at a location in your hometown area unless you and we both agree to another location or telephonic arbitration. To start an arbitration, you or we must do the following things:

(1) Write a Demand for Arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered. You can find a copy of a Demand for Arbitration at jamsadr.com.

(2) Send three copies of the Demand for Arbitration, plus the appropriate filing fee to:

JAMS
500 North State College Blvd., Suite 600
Orange, CA 92868
1-800-352-5267

(3) Send one copy of the demand for arbitration to the other party.

(c) Special Rules. (i) In the arbitration proceeding, the arbitrator has no authority to make errors of law, and any award may be challenged if the arbitrator does so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. (ii) Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

(d) Exceptions. Notwithstanding the foregoing: (i) any Claim based on Section 10 above, and (ii) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 or any other statement or law governing theft of service, may be decided only by a court of competent jurisdiction.

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10. MISCELLANEOUS

(a) Notice. Notices to you will be deemed given when personally delivered, addressed to you at your last known address and deposited in the U.S. Mail (which may include inclusion in your billing statement), or sent via Internet to the e-mail address you provided us or sent via satellite to your receiver or delivered when a voice message is left at the telephone number on your account. Your notices to us will be deemed given when we receive them at the address or telephone number on the first page of this Agreement.

(b) Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

(c) Assignment of Account. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including, without limitation, collection of unpaid amounts, or in the event of an acquisition, corporate reorganization, merger or sale of substantially all of the party's assets to another entity. You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

(d) Other. This Agreement and any lease, activation, programming, or other service commitment agreement that you entered into in connection with obtaining Receiving Equipment constitute our entire agreement. No salesperson or other representative is authorized to change it. If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable. The terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU.

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DIRECTV.

CUSTOMER AGREEMENT

Effective as of April 24, 2007, until replaced

THIS DOCUMENT DESCRIBES THE TERMS AND CONDITIONS OF YOUR RECEIPT AND PAYMENT OF DIRECTV® SERVICE AND IS SUBJECT TO ARBITRATION (SECTION 9). IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR SERVICE. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THEY WILL BE LEGALLY BINDING. TO VIEW THIS AGREEMENT IN SPANISH VISIT DIRECTV.COM/ACUERDO OR CALL 1-888-788-8822 TO REQUEST A PRINTED COPY. (VISITE A DIRECTV.COM/ACUERDO O LLAME AL 1-888-788-8822 PARA SOLICITAR ESTE DOCUMENTO.)

CONTACTING DIRECTV:

You may contact us 24 hours a day, any day of the year by sending us an e-mail at directv.com/email or by writing to:

DIRECTV, Inc.
Customer Service
P.O. Box 29079
Glendale, CA 91209-9079

You can also call us at 1-800-531-5000 and speak your request into our Automated Phone System, e.g. for technical issues – say "technical"; for on-screen messages – say the extension or message you see on your TV screen; to pay your bill – say "pay my bill"; for programming questions – say the name of the package or service, etc.

If your bill for DIRECTV Service comes from a party other than DIRECTV, please use the contact information provided on your bill for any questions about your DIRECTV Service.

Thank you for choosing DIRECTV. DIRECTV provides digital satellite entertainment programming and services (referred to collectively as "Service") to residents of the United States. We do not provide Service to addresses outside of the United States.

CUSTOMER AGREEMENT

1. OUR SERVICE

These are the terms on which we will provide you Service:

(a) Program Choices. You must subscribe to a base package in order to receive additional Services such as premium movie services or sports subscriptions. All programming selections have their own rates, terms and conditions. Information about programming is at directv.com.

(b) Ordering Pay Per View. You may order Pay Per View Services by using your on-screen guide and remote control, by ordering at directv.com, by calling us and speaking the name of your event into our Automated Phone System, or by ordering through an agent. If you call an agent to order, the maximum fee may apply (described in section 2). A reduced fee is available for Pay Per View orders placed at directv.com or through the Automated Phone System. To use your remote control to order, your receiver must be continuously connected to a land-based telephone line. Your order is transmitted via the telephone line, and during the short transmission period, you may not be able to use the line for other purposes. Repeated cancellation of previously ordered Pay Per View Services may result in cancellation of your account, restrictions on your ability to order Pay Per View Services, or imposition of additional fees for Pay Per View Services.

(c) Your Programming Changes. You may change your programming selection by notifying us. A fee may apply to such changes (described in Sections 2 & 5(b)). Some programming may be purchased in minimum blocks of one month or multiples of one month.

(d) Our Programming Changes. Many changing circumstances affect the availability, cost and quality of programming and customer demand for it. Accordingly, we must reserve the unrestricted right to change, rearrange, add or delete our programming packages, the selections in these packages, our prices, and any other Services we offer, at any time. We will endeavor to notify you of any change that is within our reasonable control and its effective date. In most cases, this notice will be about one month in advance. You always have the right to cancel your Service, in whole or in part, if you do not accept the change (see Section 5). If you cancel your Service, a deactivation fee (described in Sections 2 & 5(b)) or other charges may apply. Credits, if any, to your account will be posted as described in Section 5. If you do not cancel, your continued receipt of our Service will constitute acceptance.

(e) Access Card. You have received a conditional access card (referred to as the "Access Card") and a License Agreement governing your use of the Access Card while you are receiving our Service. Access Cards are nontransferable and are the exclusive property of DIRECTV. If you tell us that the original Access Card was lost, damaged, defective or stolen, we will replace it, so long as there is no evidence of unauthorized tampering with or modification of the Access Card and your account is in good standing. A replacement fee may apply (described in Section 2). Tampering with or other unauthorized modification of the Access Card is strictly prohibited and may result in criminal or civil action. Tampering with or inserting any device into your receiver other than an authorized unmodified Access Card is prohibited. DIRECTV reserves the right to cancel or replace the Access Card. Upon request, the card must be returned to DIRECTV. If you do not return the Access Card to DIRECTV when you cancel your Service, you may be charged a fee as described in Section 2. Requesting Access Cards on behalf of other persons or for purposes other than lawful viewing of DIRECTV Service is prohibited.

(f) Phone Connections. For optimal performance of your Receiving Equipment, including ordering with your remote control or receiving certain Services, each of your receivers must be directly connected to the same land-based telephone line. If you add Service on additional TVs, you may purchase a separate subscription for each additional TV, or, if all your receivers are continuously connected to the same land-based telephone line, we can "mirror" programming to your additional TVs and charge you only the fee amount described in Section 2. You agree to provide true and accurate information about the location of your receivers. If we detect that any receiver is not regularly connected to a land-based telephone line, we may investigate and, if it is determined that the receiver is not at the location identified on your account, we may disconnect the receiver or charge you the full program/mirroring subscription price for the receiver.

(g) Mobile Units. We provide Service to Receiving Equipment installed in mobile units such as campers, boats and other recreational vehicles. However, this Receiving Equipment is not eligible for the additional TV authorization discount (described in 1(f)).

(h) Private Viewing. We provide Service only for your private non-commercial use, enjoyment and home viewing. The programming may not be viewed in areas open to the public or in commercial establishments. You may not retransmit, transmit or perform the programming, charge admission for its viewing or transmit or distribute running accounts of it. You may not use any of our trademarks. Notwithstanding the provisions of Section 9, we or any programming provider may prosecute violations of the foregoing against you and other responsible parties in any court of competent jurisdiction, under the rules and regulations of the Federal Communications Commission and other applicable laws.

(i) Blackouts. Certain programming, including sports events, may be blacked out in your local reception area. Blackout restrictions are decided by the sports leagues and the other entities that own the local broadcast rights. You may visit directv.com for more blackout information. If you, circumvent or attempt to circumvent any of these blackouts, you may be subject to legal action.

(j) Loss of Receiving Equipment. You should notify us immediately if your receiver, remote control or receiving antenna dish (referred to collectively as "Receiving Equipment") is lost or stolen. If you notify us within 5 days, we will not charge you for unauthorized use. In any case, we will not charge you for unauthorized use occurring after we receive your notice. For leased Receiving Equipment, non-return fees as specified in the Equipment Lease Addendum will apply.

(k) Transfer of Receiving Equipment. We consider you to be responsible for, and the recipient of programming on, any Receiving Equipment you own. You are liable for charges incurred in the use of your Receiving Equipment by others until you notify us of a transfer. Leased Receiving Equipment may not be transferred.

(l) Your Viewing Restrictions. It is your responsibility to impose any viewing restrictions on other family members or guests. If you think appropriate. We are not responsible to you or anyone else based on the content of our programming. Please visit directv.com for information on parental controls, locks and limits and password protection on your account.

(m) Change of Address. You must notify us immediately of any change in your name, mailing address, residence address or telephone number.

2. PAYMENT

In return for receiving our Service, you promise to pay us as follows:

(a) Programming. You will pay in advance, at our rates in effect at the time, for all Service ordered by you or anyone who uses your Receiving Equipment, with or without your permission, until the Service is canceled. The outstanding balance is due in full each month. We may, in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. Any "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us. We may reduce your service to a minimum service level, at our rates in effect at the time, or deactivate your Service if you do not pay your statements on time, after any applicable grace period.

(b) Taxes. You will pay all taxes or other governmental fees and charges, if any, which are assessed.

(c) Administrative Fees. In order to control the basic charges, which apply to all customers, we charge fees that arise in specific circumstances

only to those customers reasonable for them. This list is and exclusive, and DIRECTV reserves the right to modify these fees or charge additional fees. Accordingly, you will pay the following fees when they are applicable:

(1) *Account Activation Fee:* We may charge you a fee of: (i) up to $19.99; or (ii) the maximum amount permitted under applicable law prior to or upon activation of your Service account, whichever is less.

(2) *Access Card Replacement Fee:* If you do not return the Access Card when requested to do so, or if we have to replace the Access Card, we may charge you a replacement fee of up to $20.00. If you return the old Access Card to us, you may receive [illegible] credit to your account. If you request overnight delivery of the replacement Access Card, you must pay a shipping and handling fee of up to $15.00.

(3) *Additional TV Authorization Fee:* If you meet the qualifications described in Section 1(f), we may charge you a monthly fee of up to $4.99 for separate Services on each additional TV, rather than a full subscription fee for Services on each additional TV. This reduced rate is available only if all receivers are located at your residence.

(4) *Administrative Late Fee:* If we do not receive your payment by the due date on your bill, we may charge you an administrative late fee of (i) $5.00; or (ii) the maximum amount permitted under and subject to applicable law per month or partial month until the delinquent amount is paid in full. This late fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature. You acknowledge that this fee is reasonably related to the actual expenses we incur due to late payment and may be subject to limitations set forth by law in your state.

(5) *Change of Service Fee:* If you change your Service package to a lower-priced package, we may charge you a fee the lesser of (i) up to $10.00; or (ii) the maximum amount permitted by applicable law.

(6) *Phone Payment Fee:* If you elect to pay any outstanding balance over the telephone with an agent, we may charge you the lesser of (i) up to $10.00; or (ii) the maximum amount permitted by applicable law. To avoid this fee, you can pay your bill through our Automated Phone System by saying "Pay my bill," or at directv.com.

(7) *Deposits:* We may require that you provide a deposit prior to or after activation of your Service, which we may apply against any unpaid amounts at any time. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.

(8) *Order Assistance Fee:* If you order a Pay Per View Service by calling and speaking with an agent, we may charge you a fee of up to $5.00, or up to $1.50 if you order via our Automated Phone System, for each separate movie, event or other program so ordered, even if it is later canceled. There is no order assistance fee for orders placed at directv.com.

(9) *Deactivation Fee:* If you cancel your Service or we deactivate your Service because of your failure to pay or for some other breach on your part, we may charge you a fee the lesser of (i) up to $15.00; or (ii) the maximum amount permitted by applicable law.

(10) *Duplicate Statement Fee:* If you request a duplicate statement, we may charge you a fee the lesser of (i) up to $1.75; or (ii) the maximum amount permitted by applicable law for each statement copy.

(11) *Ledger Request Fee:* If you request a payment ledger itemizing past payments on your account, we may charge you a fee the lesser of (i) up to $2.75; or (ii) the maximum amount permitted by applicable law.

(12) *Returned Payment Fee:* If any bank or other financial institution refuses to honor any payment, draft or instrument submitted for payment to your account, we may charge you a fee the lesser of (i) up to $25.00; or (ii) the maximum amount permitted by applicable law. You acknowledge that this fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expenses we incur due to unsatisfied payment.

(g) Billing Statements. We will send you a statement for each billing cycle (usually once every 30 days) unless you have a zero or nominal balance due, or a nominal credit balance, on your account at the end of a billing cycle. Statements will show: (1) payments, credits, purchases and any other charges to your account; (2) the amount you owe us and (3) the payment due date. If you elect to make automatic credit or debit card payments, you will not receive monthly statements unless you request that they be sent.

(h) Questions About Your Statement. If you think your statement is incorrect or if you need more information about it, contact us immediately. We will try to resolve any complaints you have as promptly as we can.

Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible reduction or deactivation of Service.

Remember, if your bill for DIRECTV Service comes from a party other than DIRECTV, please use the contact information on your bill.

(i) Consents Regarding Credit. In order to establish an account with us, you authorize us to inquire into your creditworthiness (subject to Section 6), by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or nonpayment to credit reporting agencies. Due to the subjective nature of creditworthiness, we reserve the right to require prepayment for any Service via cashier's check, money order or credit card, notwithstanding your credit rating, past history or practice.

(j) Collection Costs. To the extent permitted by law, you will pay us any costs and fees we reasonably incur to collect amounts you owe us.

3. CUSTOMER INFORMATION

(a) Representations. You represent that you are at least 18 years of age and a resident of the United States.

(b) Contact Information. You agree to provide true, accurate, current and complete contact information about yourself, and maintain and promptly update your contact information to keep it true, accurate and complete.

(c) Online Access. You are responsible for maintaining the confidentiality of the password and account username used for online billing and account maintenance at directv.com, and are fully responsible for all activities that occur under your password and account. You agree to: (i) keep your username and password confidential and not share them with anyone else; (ii) immediately notify DIRECTV of any unauthorized use of your password and account or other breach of security and (iii) use only your username and password to log into directv.com.

4. CHANGES IN CONTRACT TERMS

We reserve the right to change the terms and conditions on which we offer Service. If we make any such changes, we will send you a copy of your new Customer Agreement containing the effective date. You always have the right to cancel your Service, in whole or in part at any time, and you may do so if you do not accept any such changed terms or conditions. If you do cancel, you may be charged an early cancellation fee if you entered into a separate programming commitment or a deactivation fee. You will be issued a credit, if any, in accordance with Section 5. If you elect not to cancel your Service after receiving a new Customer Agreement, your continued receipt of Service from us will constitute acceptance of the changed terms and conditions. If you notify us that you do not accept such terms and conditions, then we may cancel your Service as provided in Section 5, as we cannot offer Service to different customers on different terms, among other reasons.

5. CANCELLATION

(a) Term. The term of this Agreement is indefinite and Service will continue until canceled as provided herein. UNLESS YOU NOTIFY US THAT YOU WISH TO CANCEL IT, WE WILL AUTOMATICALLY RENEW SERVICE THAT YOU SUBSCRIBE TO ON A PERIODIC BASIS, INCLUDING ANY MONTHLY OR ANNUAL SUBSCRIPTIONS AND SEASONAL SPORTS SUBSCRIPTIONS, AS LONG AS WE CONTINUE TO CARRY THE SERVICE.

(b) Your Cancellation. You may cancel Service by notifying us. You may be charged a deactivation fee as described in Section 2 and issued a credit as described below. Your notice is effective on the day we receive it. You will still be responsible for payment of all outstanding balances accrued through that effective date, in addition to any deactivation or change of service fees provided in Section 2. If you cancel Service or change your Service package, you may be subject to an early cancellation fee if you entered into a separate programming commitment with DIRECTV in connection with obtaining Receiving Equipment, and have failed to maintain the required programming package for the required period of time.

For Services sold only in blocks of one month or multiples of one month, if you cancel such Service, we will credit you only for full months not used. For example, if you subscribe for a year of such Service from January through December but cancel on March 10, we will credit you for the subscription fees for April through December. However, we will not credit any fees for January through March. Additionally, we will not credit seasonal sports subscriptions after the season starts.

(c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, breach any other material provision of this Agreement, or act abusively toward our staff. In each case, you will still be responsible for payment of all outstanding balances accrued through that effective date, including the deactivation fee described in Section 2. In addition, we may cancel your Service if you elect not to accept any changed terms described to you, as provided in Section 4.

(d) Credit Balances. If you have a credit balance after the close of your account and issuance of the final bill, we will automatically issue you a refund. However, if your credit balance is less than $1.00, we will not issue you a refund unless you make a written request for the refund. If you do not make such a written request for the refund within one year of the close of your account, you forfeit any credit balance remaining on your account and your account balance will be reset to zero.

(e) Payment Upon Cancellation. You acknowledge that you have provided your credit or debit card account information to us. You understand that you will incur fees and charges as a result of your receipt and use of Service and/or Receiving Equipment, and may incur early cancellation fees and/or equipment non-return fees (as specified in any retail, programming or other service commitment agreement you entered into in connection with obtaining Receiving Equipment). By giving us your

other or debit card account information, you authorize us to apply the method of payment, in accordance with applicable law, to satisfy any and all amounts due upon cancellation. You further acknowledge that you are required to maintain current credit or debit card information with us and agree to notify us whenever there is a change in such information, such as a change in the card number or the expiration date.

6. PERSONAL DATA

We collect Personally Identifiable Information about our customers ("Personal Data"). The use and disclosure of the Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy Policy, by this Agreement. A copy of our Privacy Policy is available at directv.com. We will also send you a copy if you send your written request to this address: DIRECTV Privacy Policy, P.O. Box 29076, Glendale, CA 91209-9079.

7. DIRECTV® DVR SERVICE

DIRECTV DVR Service is a proprietary and service, all our rates in effect at the time, available to customers with DVR-enabled Receiving Equipment. DIRECTV DVR Service gives you the ability to see and record televised programs ("Third Party Content"). You understand that DIRECTV does not guarantee the access to or recording of any particular program, or the length of time any particular recorded program may remain available for your viewing. You also understand that Third Party Content is the copyrighted material of the third party that supplies it, is protected by copyright and other applicable laws, and may not be reproduced, published, broadcast, rewritten or redistributed without the written permission of the third party that supplied it, except to the extent allowed under the "fair use" provisions of the U.S. copyright laws or comparable provisions of foreign laws. You agree that DIRECTV will have no liability to you, or anyone else who uses your DIRECTV DVR Service, with regard to any Third Party Content. DIRECTV may, at its discretion, from time to time change, add or remove features of the DIRECTV DVR Service, or change the service fee for DIRECTV DVR Service.

We generally use data telephone calls to provide the DIRECTV DVR Service. You are responsible for such telephone charges and acknowledge and agree that you shall be solely responsible for all disputes with any telephone company related to the same.

If you paid a "lifetime service fee," you will not be charged a fee for your DIRECTV DVR Service as long as you maintain television programming service from DIRECTV on the same account. If you disconnect your DIRECTV television programming service and later reconnect on the same account, your DIRECTV DVR Service will be reconnected and you will not be charged a fee for DIRECTV DVR Service.

By receiving the DIRECTV DVR Service, you agree to the following license. The term "Software" shall include any updates, modified versions, additions and copies of certain software for the DIRECTV DVR Service (or your Receiving Equipment) that may be provided by DIRECTV from time to time. The term "End User Documentation" shall mean the documentation and relevant explanatory written materials provided to you in connection with licensing by you of any Software. DIRECTV grants to you a non-exclusive license to use the Software, provided that you agree to the following:

(a) License Grant. You may use the Software solely in executable code form and solely in conjunction with the use of your Receiving Equipment.

(b) Restrictions. You may not copy, modify, transfer, disseminate or publish the Software, or any copy thereof, in whole or in part. You may not reverse engineer, disassemble, decompile or translate the Software, or otherwise attempt to derive the source code of the Software, except to the extent allowed under any applicable law. Any attempt to transfer any of the rights, duties or obligations of this license agreement is void. You may not rent, lease, load, resell for profit or distribute the Software, or any part thereof.

(c) Ownership. The Software is licensed, not sold, to you solely for your use under the terms of this license agreement, and DIRECTV and its suppliers reserve all rights not expressly granted to you. You shall own the media, if any, on which Software or End User Documentation is recorded, but DIRECTV and its suppliers retain ownership of all copies of the Software itself.

(d) Assumption of Risks. Except as stated above, this license agreement does not grant to you any intellectual property rights in the Software.

(e) Term. If you breach any term or condition of this license agreement, this license agreement will terminate immediately upon notice to you.

(f) Warranty Disclaimer. NEITHER DIRECTV NOR ANY OF ITS REPRESENTATIVES MAKES OR PASSES ON TO YOU OR OTHER THIRD PARTIES ANY WARRANTY OR REPRESENTATION ON BEHALF OF DIRECTV OR ITS SUPPLIERS (INCLUDING TIVO) WITH RESPECT TO THE SOFTWARE, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS.

(g) Limitation of Liability. IN NO EVENT WILL DIRECTV OR ITS SUPPLIERS BE LIABLE TO YOU WITH RESPECT TO THE SOFTWARE FOR ANY CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, INCLUDING LOST PROFITS OR LOST SAVINGS, EVEN IF DIRECTV OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY ANY THIRD PARTY. Some states or jurisdictions do not allow the exclusion or limitation of incidental, consequential or special damages, so the above limitations may not apply to you.

(h) Third-Party Beneficiary. DIRECTV and you expressly acknowledge and agree that TiVo, Inc., a Delaware corporation with its principal place of business at 2160 Gold Street, Alviso, CA 95002, is an intended third-party beneficiary of this license agreement as it relates to TiVo software that may be contained in the Receiving Equipment. These license provisions are made expressly for the benefit of TiVo and are enforceable by TiVo in addition to DIRECTV.

8. LIMITS ON OUR RESPONSIBILITY

(a) Service Interruptions. Service may be interrupted from time to time for a variety of reasons. We are not responsible for any interruptions of Service that occur due to acts of God, power failure or any other cause beyond our reasonable control. However, because we value our customers, for an interruption of a significant length of time that is within our reasonable control, upon your request we will provide what we reasonably determine to be a fair and equitable adjustment to your account to make up for such Service interruption. THIS WILL BE YOUR SOLE REMEDY AND OUR SOLE DUTY IN SUCH CASES.

(b) Disclaimers. EXCEPT AS EXPRESSLY PROVIDED HEREIN, WE MAKE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, REGARDING ANY SERVICE OR YOUR RECEIVING EQUIPMENT. ALL SUCH WARRANTIES OR REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT ARE DISCLAIMED.

(c) Limitations of Liability. WE ARE NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE RECEIVING EQUIPMENT OR ANY SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE, REGARDLESS OF THE CAUSE. OUR TOTAL LIABILITY FOR DAMAGES OR LOSSES TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE, WILL IN NO EVENT EXCEED THE AMOUNT THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. You may have greater rights than described above under your state's laws. You should consult them.

(d) Warranty Services. You agree that this Agreement does not provide for, and the Service does not include, any warranty services or other services that we might provide separately, including, without limitation, any fee-based or other warranty programs.

9. RESOLVING DISPUTES

In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim relating to this Agreement, any addendum, or your Service (referred to as a "Claim") will be resolved as follows:

(a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 9(f)) sooner than at least 60 days after one of us notifies the other of a Claim in writing. You will send your notice to the address on the front page of this Agreement, and we will send our notice to your billing address.

(b) Formal Resolution. Except as provided in Section 9(d), if we can not resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated (referred to as the "JAMS Rules") and under the rules set forth in this Agreement. If there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL. You may, in arbitration, seek any and all remedies otherwise available to you pursuant to your state's law. If you decide to initiate arbitration, you agree to tell us in writing the amount that you would pay to file a lawsuit against us in the appropriate court of law in your state. Unless we agree to pay your fee for you, you only need to pay an arbitration initiation fee equal to state court filing fee, not to exceed $128; we agree to pay any additional fee or deposit required by JAMS to initiate your arbitration. We also agree to pay the costs of the arbitration proceeding. Other fees, such as attorney's fees and expenses of travel to the arbitration will be paid in accordance with JAMS Rules. The arbitration will be held at a location in your hometown area unless you and we both agree to another location or telephonic arbitration. To start an arbitration, you or we must do the following things:

(1) Write a Demand for Arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered. You can find a copy of a Demand for Arbitration at jamsadr.com.

(2) Send three copies of the Demand for Arbitration, plus the appropriate filing fee to:

JAMS
500 North State College Blvd., Suite 600
Orange, CA 92868
1-800-352-5267

(3) Send one copy of the demand for arbitration to the other party.

(c) Special Rules. (i) In the arbitration proceeding, the arbitrator has no authority to make errors of law, and any award may be challenged if the arbitrator does so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. (ii) Neither you nor we shall be entitled to

join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to disallow class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

(d) Exceptions. Notwithstanding the foregoing: (i) any Claim based on Section 10(b) above; and (ii) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 or any other statement or law governing theft of service, may be decided only by a court of competent jurisdiction.

10. MISCELLANEOUS

(a) Notice. Notices to you will be deemed given when personally delivered, addressed to you at your last known address and deposited in the U.S. Mail (which may include inclusion in your billing statement), or sent via Internet to the e-mail address you provided us or sent via satellite to your receiver or delivered when a voice message is left at the telephone number on your account. Your notices to us will be deemed given when we receive them at the address or telephone number on the first page of this Agreement.

(b) Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

(c) Assignment of Account. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including, without limitation, collection of unpaid amounts, or in the event of an acquisition, corporate reorganization, merger or sale of substantially all of the party's assets to another entity. You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

(d) Other. This Agreement and any lease, activation, programming, or other service commitment agreement that you entered into in connection with obtaining Receiving Equipment constitute our entire agreement. No salesperson or other representative is authorized to change it. If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable. The terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU.

DIRECTV, Inc. DIRECTV and the Cyclone Design logo are registered trademarks of DIRECTV, LLC, [illegible]

[illegible]

DIRECTV.

CUSTOMER AGREEMENT

Effective as of April 24, 2006, until replaced

THIS DESCRIBES THE TERMS AND CONDITIONS OF YOUR RECEIPT AND PAYMENT OF DIRECTV® SERVICE AND IS SUBJECT TO ARBITRATION (SECTION 9). IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR SERVICE. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THEY WILL BE LEGALLY BINDING. IF YOU OBTAINED RECEIVING EQUIPMENT DURING OR AFTER MARCH 2006, THE EQUIPMENT LEASE ADDENDUM, AVAILABLE AT DIRECTV.COM, GOVERNS YOUR RECEIPT, USE, AND RETURN OF EQUIPMENT. TO VIEW BOTH AGREEMENTS IN SPANISH, VISIT DIRECTV.COM/ACUERDO OR CALL 1-888-388-6822 TO REQUEST A PRINTED COPY. (VISITE A DIRECTV.COM/ACUERDO O LLAME AL 1-888-388-6822 PARA SOLICITAR ESTE DOCUMENTO.)

CONTACTING DIRECTV:

You may contact us 24 hours a day, any day of the year, by sending us an e-mail at directv.com/email or by writing to:

DIRECTV, Inc.
Customer Service
P.O. Box 6550
Greenwood Village, CO 80155-6550

You can also call us at 1-800-531-5000 and speak your request into our Automated Phone System, e.g., for technical issues – say "technical"; for on-screen messages – say the information or message you see on your TV screen; to pay your bill – say "pay my bill"; for programming questions – say the name of the package or service, etc. For bill inquiries, call hours are 8am - 8pm (your local time) Sun - Fri and 8am - 12:30am ET on Sat.

If your bill for DIRECTV Service comes from a party other than DIRECTV, please use the contact information provided on your bill for any questions about your DIRECTV Service.

Thank you for choosing DIRECTV. DIRECTV provides digital satellite entertainment programming and services (referred to collectively as "Service") to residents of the United States. We do not provide Service to addresses outside of the United States.

CUSTOMER AGREEMENT

1. OUR SERVICE

These are the terms on which we will provide you Service.

(a) Programming Choices. You must subscribe to a base package in order to receive additional Services such as premium movie services or sports subscriptions. All programming selections have their own rates, terms and conditions. Information about programming is at directv.com.

(b) Ordering Pay Per View. You may order Pay Per View Services by using your on-screen guide and remote control, by ordering at directv.com, by calling us and speaking the name of your event into our Automated Phone System, or by ordering through an agent. Programs recorded to a DVR may automatically delete after 24 hours. If you call an agent to order, the maximum fee may apply (described in Section 2). A reduced fee is available for Pay Per View orders placed at directv.com or through the Automated Phone System. To use your remote control to order, your receiver must be continuously connected to a land-based telephone line. Your order is transmitted via the telephone line, and during the short transmission period, you may not be able to use the line for other purposes. Repeated cancellation of previously ordered Pay Per View Services may result in cancellation of your account, restrictions on your ability to order Pay Per View Services, or imposition of additional fees for Pay Per View Services.

(c) Your Programming Changes. You may change your programming selection by notifying us. A fee may apply to such changes (described in Sections 2 & 5(b)). Some programming may be purchased in minimum blocks of one month or multiples of one month.

(d) Our Programming Changes. Many factors affect the availability, cost and quality of programming and may influence the decision to raise prices and the amount of any increase. These include, among others, programming and other costs, consumer demand, market and shareholder expectations, and changing business conditions. Accordingly, we must reserve the unrestricted right to change, rearrange, add or delete our programming packages, the selections in those packages, our prices, and any other Service we offer, at any time. We will endeavor to notify you of any change that is within our reasonable control and to effective date. In most cases, this notice will be about one month in advance. You always have the right to cancel your Service, in whole or in part, if you do not accept the change (see Section 5). If you cancel your Service, a deactivation fee (described in Sections 2 & 5(b)) or other charges may apply. Credits, if any, to your account will be posted as described in Section 5. If you do not cancel, your continued receipt of our Service will constitute acceptance.

(e) Access Card. You have received a conditional access card (referred to as the "Access Card") and a License Agreement governing your use of the Access Card while you are receiving our Service. Access Cards are nontransferable and are the exclusive property of DIRECTV. If you tell us that the original Access Card was lost, damaged, defective or stolen, we will replace it, as long as there is no evidence of unauthorized tampering with or modification of the Access Card and your account is in good standing. A replacement fee may apply (described in Section 2). Tampering with or other unauthorized modification of the Access Card is strictly prohibited and may result in criminal or civil action. Tampering with or inserting any device into your receiver other than an authorized unmodified Access Card is prohibited. DIRECTV reserves the right to cancel or replace the Access Card. Upon request, the card must be returned to DIRECTV. If you do not return the Access Card to DIRECTV when you cancel your Service, you may be charged a fee as described in Section 2. Requesting Access Cards on behalf of other persons or for purposes other than lawful viewing of DIRECTV Service is prohibited.

(f) Phone Connections. For optimal performance of your Receiving Equipment, including ordering with your remote control or receiving certain Services, each of your receivers must be directly connected to the same land-based telephone line. If you add Service on additional TVs, you may purchase a separate subscription for each additional TV, or, if all your receivers are continuously connected to the same land-based telephone line, we can "mirror" programming to your additional TVs and charge you only the fee amount described in Section 2. You agree to provide true and accurate information about the location of your receivers. If we detect that any receiver is not regularly connected to a land-based telephone line, we may investigate and, if it is determined that the receiver is not at the location described on your account, we may disconnect the receiver or charge you the full programming subscription price for the receiver.

(g) Mobile Units. We provide Service to Receiving Equipment installed in mobile units such as campers, boats and other recreational vehicles. However, this Receiving Equipment is not eligible for the additional TV authorization discount described in Section 1(f).

(h) Private Viewing. We provide Service only for your private, non-commercial use, enjoyment and home viewing. The programming may not be viewed in areas open to the public or in commercial establishments. You may not rebroadcast, transmit or perform the programming, charge admission for its viewing or transmit or distribute running accounts of it. You may not use any of our trademarks. Notwithstanding the provisions of Section 9, we or any programming provider may prosecute violations of the foregoing against you and other responsible parties in any court of competent jurisdiction, under the rules and regulations of the Federal Communications Commission and other applicable laws.

(i) Blackouts. Certain programming, including sports events, may be blacked out in your local reception area. Blackout restrictions are decided by the sports leagues and the other entities that own the local broadcast rights. You may visit directv.com for more blackout information. If you circumvent or attempt to circumvent any of these blackouts, you may be subject to legal action.

(j) Loss of Receiving Equipment. You should notify us immediately if your receiver, remote control or receiving antenna dish (referred to collectively as "Receiving Equipment") is lost or stolen. If you notify us within 5 days, we will not charge you for unauthorized use. In any case, we will not charge you for unauthorized use occurring after we receive your notice. For leased Receiving Equipment, non-return fees as specified in the Equipment Lease Addendum will apply.

(k) Transfer of Receiving Equipment. We consider you to be responsible for and the recipient of programming on any Receiving Equipment you own. You are liable for charges incurred in the use of your Receiving Equipment by others until you notify us of a transfer. Leased Receiving Equipment may not be transferred.

(l) Your Viewing Restrictions. It is your responsibility to impose any viewing restrictions or other family members or guests, as you think appropriate. We are not responsible to you, or anyone else, based on the content of our programming. Please visit directv.com for information on parental controls, locks and limits and password protection on your account.

(m) Change of Address. You must notify us immediately of any change in your name, mailing address, residence address or telephone number.

2. PAYMENT

In return for receiving our Service, you promise to pay us as follows:

(a) Programming. You will pay in advance, at our rates in effect at the time, for all Service ordered by you, or anyone who uses your Receiving Equipment, with or without your permission, until the Service is canceled. The outstanding balance is due in full each month. To establish service, you were required to provide a credit card. You may use this or another credit or debit card to establish recurring payments. See Section 5(e) regarding payment upon cancellation. We may, in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. No "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us. We may reduce your Service to a minimum service level, at our rates in effect at the time, or deactivate your Service if you do not pay your statements on time, after any applicable grace period.

(b) Taxes. You will pay all state and local taxes or other governmental fees and charges, if any, which are assessed.

(c) Administrative Fees. To control the basic charges which apply to all customers, we may charge fees that arise in specific circumstances only to those customers responsible for them. The list below is not exclusive, and DIRECTV reserves the right to modify these fees or charge additional fees. **In each case, we will charge you the lesser of the fee listed or the maximum amount permitted under applicable law:**

(1) *Up to $100 Account Activation Fee*: upon activation of your Service account.

(2) *Up to $500 Access Card Replacement Fee*: If you lose or fail to

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Return your Access Card (a partial credit may be posted to your account if the Access Card is later returned). If you request overnight delivery of a replacement Access Card, a shipping and handling fee of up to $16.50 applies.

(3) *Up to $5.00 Additional TV Authorization Fee* in connection with obtaining Service on each additional TV connected to Receiving Equipment you own, provided you meet the qualifications specified in Section 1.(f) and the Receiving Equipment is located at your residence. Customers with leased Receiving Equipment do not pay this fee, but pay the Lease Fee specified in the Equipment Lease Addendum.

(4) ***Up to $5.00 Late Fee:*** **If we do not receive your payment by the due date on your bill, we may charge you an administrative late fee of (I) $5.00; or (II) the maximum amount permitted under and subject to applicable law per month or partial month until the delinquent amount is paid in full.** This late fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature. You acknowledge that this fee is reasonably related to the actual expense we incur due to late payment and may be subject to limitations as set forth by the law in your state.

(5) *Up to $10.00 Change of Service Fee*, if you change your Service package to a lower-priced package. See also Section 5(b).

(6) *Up to $10.00 Phone Payment Fee*, if you elect to pay any outstanding balance over the telephone with an agent. To avoid this fee, you can pay your bill through our Automated Phone System by saying "Pay my bill," or at directv.com.

(7) *Deposits*. We may require that you provide a deposit prior to or after activation of your Service, which we may apply against any unpaid amounts at any time. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.

(8) *Up to $5.00 Order Assistance Fee*, if you order a Pay Per View Service by calling and speaking with an agent. A fee of up to $1.50 may apply if you order via our Automated Phone System. Fees are per movie, event or program so ordered, even if later canceled. There is no order assistance fee for orders placed at directv.com.

(9) *Up to $15.00 Deactivation Fee* if you cancel your Service or we deactivate your Service because of your failure to pay or for some other breach on your part.

(10) *Up to $1.75 Duplicate Statement Fee* for each statement request.

(11) *Up to $2.75 Ledger Request Fee* for ledger itemizing past payments on your account.

(12) *Up to $20.00 Returned Payment Fee*, if any bank or other financial institution refuses to honor any payment, draft or instrument submitted for payment on your account. You acknowledge that this fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expense we incur due to unsatisfied payment.

(d) Billing Statements. We will send you a statement for each billing cycle (usually once every 30 days) unless you have a zero or nominal balance due, or a nominal credit balance, on your account at the end of a billing cycle. Statements will show: (1) payments, credits, purchases and any other charges to your account, (2) the amount you owe us and (3) the payment due date. If you elect to make automatic credit or debit card payments, you will not receive monthly statements unless you request that they be sent.

(e) Questions About Your Statement. If you think your statement is incorrect or if you need more information about it, contact us immediately. We will try to resolve any complaints you have as promptly as we can.

You must contact us within 60 days of receiving the statement in question. Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible reduction or deactivation of Service.

Remember, if your bill for DIRECTV Service comes from a party other than DIRECTV, please use the contact information on your bill.

(f) Consents Regarding Credit. In order to establish an account with us, you authorize us to inquire into your creditworthiness (subject to Section 6), by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or nonpayment to credit reporting agencies. Due to the subjective nature of creditworthiness, we reserve the right to require prepayment for any Service via cashier's check, money order or credit card, notwithstanding your credit rating, past history or practice.

(g) Collection Costs. To the extent permitted by law, you will pay us any costs and fees we reasonably incur to collect amounts you owe us.

3. CUSTOMER INFORMATION

(a) Representations. You represent that you are at least 18 years of age and a resident of the United States.

(b) Contact Information. You agree to provide true, accurate, current and complete contact information about yourself, and maintain and promptly update your contact information to keep it true, accurate and complete.

(c) Online Access. You are responsible for maintaining the confidentiality of the password and account e-mail address used for online billing and account maintenance at directv.com, and are fully responsible for all activities that occur under your password and account. You agree to: (i) keep your e-mail address and password confidential and not share them with anyone else; (ii) immediately notify DIRECTV of any unauthorized use of your password and account or other breach of security; and (iii) use only your e-mail address and password to log into directv.com.

4. CHANGES IN CONTRACT TERMS

We reserve the right to change the terms and conditions on which we offer Service. If we make any such changes, we will send you a copy of your new Customer Agreement containing its effective date. You always have the right to cancel your Service, in whole or in part, at any time, and you may do so if you do not accept any such changed terms or conditions. See Sections 5(b), (d) and (e) below. If you elect not to cancel your Service after receiving a new Customer Agreement, your continued receipt of Service constitutes acceptance of the changed terms and conditions. If you notify us that you do not accept such terms and conditions, then we may cancel your Service as provided in Section 5, as we cannot offer Service to different customers on different terms, among other reasons.

5. CANCELLATION

(a) Term. The term of this Agreement is month-to-month and Service will continue until canceled as provided herein. UNLESS YOU NOTIFY US THAT YOU WISH TO CANCEL IT, WE WILL AUTOMATICALLY RENEW SERVICE THAT YOU SUBSCRIBE TO ON A PERIODIC BASIS, INCLUDING ANY MONTHLY OR ANNUAL SUBSCRIPTIONS AND SEASONAL SPORTS SUBSCRIPTIONS, AS LONG AS WE CONTINUE TO CARRY THE SERVICE.

(b) Your Cancellation. You may cancel Service by notifying us. You may be charged a deactivation fee as described in Section 2 and issued a credit as described below. Your notice is effective on the day we receive it. You will still be responsible for payment of all outstanding balances accrued through that effective date. In addition to any deactivation or change of service fees provided in Section 2, if you cancel Service or change your Service package, you may be subject to an early cancelation fee if you entered into a programming commitment with DIRECTV in connection with the Equipment Lease Addendum, and have failed to maintain the required programming package for the required period of time.

For Services sold only in blocks of one month or multiples of one month, if you cancel such Service, we will credit you only for full months not used. For example, if you subscribe for a year of such Service from January through December but cancel on March 10, we will credit you for the subscription fees for April through December. However, we will not credit any fees for January through March. Additionally, we will not credit seasonal sports subscriptions after the season starts.

(c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, breach any other material provision of this Agreement, or act abusively toward our staff. In such case, you will still be responsible for payment of all outstanding balances accrued through that effective date, including the deactivation fee described in Section 2. In addition, we may cancel your Service if you elect not to accept any changed terms described to you, as provided in Section 4.

(d) Credit Balances. When your account is closed, we will review your account and refund any excess monetary payments. Unused portions of retention or similar credits will not be refunded. If your credit balance is less than $1.00 we will not issue you a refund unless you make a written request for the refund. If you do not make such a written request for the refund within one year of the close of your account, you forfeit any credit balance remaining on your account and your account balance will be reset to zero.

(e) Payment Upon Cancellation. You acknowledge that you have provided your credit or debit card account information to us. You understand that you will incur fees and charges as a result of your receipt and use of Service and/or Receiving Equipment, and may incur early cancelation fees and/or equipment non-return fees (as specified in any lease, programming or other service commitment agreement you entered into in connection with obtaining Receiving Equipment). By giving us your credit or debit card account information, you authorize us to apply this method of payment, in accordance with applicable law, to satisfy any and all amounts due upon cancellation. You further acknowledge that you are required to maintain current credit or debit card information with us and agree to notify us whenever there is a change in such information, such as a change in the card number or the expiration date.

6. PERSONAL DATA

We collect Personally Identifiable Information about our customers ("Personal Data"). The use and disclosure of this Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy Policy, by this Agreement. A copy of our Privacy Policy is available at directv.com. We will also send you a copy if you send your written request to this address: DIRECTV Privacy Policy, P.O. Box 6550, Greenwood Village, CO 80155-6550.

7. DIRECTV® DVR SERVICE

DIRECTV DVR Service is a separately sold service, at our rates in effect at the time, available to customers with DVR-enabled Receiving Equipment. DIRECTV DVR Service gives you the ability to see and record televised programs ("Third Party Content"). You understand that DIRECTV does not guarantee the access to or recording of any particular program, or the length of time any particular recorded program may remain available for your viewing. You also understand that Third Party Content is the copyrighted material of the third party that supplies it, is protected by copyright and other applicable laws, and may not be reproduced, published, broadcast, rewritten or redistributed without the written permission of the third party that supplied it, except to the extent allowed under the "fair use" provisions of the U.S. copyright laws or comparable provisions of foreign laws. You agree that DIRECTV will have no liability to you, or anyone else who uses your DIRECTV DVR Service, with regard to any Third Party Content. DIRECTV may, at its discretion, from time to time change, add or remove features of the DIRECTV DVR Service, or change the service fee for DIRECTV DVR Service.

We generally use local telephone calls to provide the DIRECTV DVR Service. You are responsible for such telephone charges and acknowledge and agree that you shall be solely responsible for all disputes with any telephone company related to the same.

If you paid a "lifetime service fee," you will not be charged a fee for your

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DIRECTV DVR Service as long as you maintain television programming service from DIRECTV on the same account. If you disconnect your DIRECTV television programming service and later reconnect on the same account, your DIRECTV DVR Service will be reconnected and you will not be charged a fee for DIRECTV DVR Service.

By receiving the DIRECTV DVR Service, you agree to the following license. The term "Software" shall include any updates, modified versions, additions and copies of certain software for the DIRECTV DVR Service (or your Receiving Equipment) that may be provided by DIRECTV from time to time. The term "End User Documentation" shall mean the documentation and related explanatory written materials provided to you in connection with licensing by you of any Software. DIRECTV grants to you a non-exclusive license to use the Software, provided that you agree to the following:

(a) License Grant. You may use the Software solely in executable code form and solely in conjunction with the use of your Receiving Equipment.

(b) Restrictions. You may not copy, modify, transfer, disseminate or publish the Software, or any copy thereof, in whole or in part. You may not reverse engineer, disassemble, decompile or translate the Software, or otherwise attempt to derive the source code of the Software, except to the extent allowed under any applicable law. Any attempt to transfer any of the rights, duties or obligations of this license agreement is void. You may not rent, lease, load, resell for profit or distribute the Software, or any part thereof.

(c) Ownership. The Software is licensed, not sold, to you solely for your use under the terms of this license agreement, and DIRECTV and its suppliers reserve all rights not expressly granted to you. You shall own the media, if any, on which Software or End User Documentation is recorded, but DIRECTV and its suppliers retain ownership of all copies of the Software itself.

(d) Reservation of Rights. Except as stated above, this license agreement does not grant to you any intellectual property rights in the Software.

(e) Term. If you breach any term or condition of this license agreement, this license agreement will terminate immediately upon notice to you.

(f) Warranty Disclaimer. NEITHER DIRECTV NOR ANY OF ITS REPRESENTATIVES MAKES OR PASSES ON TO YOU OR OTHER THIRD PARTIES ANY WARRANTY OR REPRESENTATION ON BEHALF OF DIRECTV OR ITS SUPPLIERS (INCLUDING TIVO) WITH RESPECT TO THE SOFTWARE, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS.

(g) Limitation of Liability. IN NO EVENT WILL DIRECTV OR ITS SUPPLIERS BE LIABLE TO YOU WITH RESPECT TO THE SOFTWARE FOR ANY CONSEQUENTIAL, INCIDENTAL OR SPECIAL DAMAGES, INCLUDING LOST PROFITS OR LOST SAVINGS, EVEN IF DIRECTV OR ITS SUPPLIERS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY ANY THIRD PARTY. Some states or jurisdictions do not allow the exclusion or limitation of incidental, consequential or special damages, so the above limitations may not apply to you.

(h) Third-Party Beneficiary. DIRECTV and you expressly acknowledge and agree that TiVo, Inc., a Delaware corporation with its principal place of business at 2160 Gold Street, Alviso, CA 95002, is an intended third-party beneficiary of this license agreement as it relates to TiVo software that may be contained in the Receiving Equipment. These license provisions are made expressly for the benefit of TiVo and are enforceable by TiVo in addition to DIRECTV.

8. LIMITS ON OUR RESPONSIBILITY

(a) Service Interruptions. Service may be interrupted from time to time for a variety of reasons. We are not responsible for any interruptions of Service that occur due to acts of God, power failure or any other cause beyond our reasonable control. However, because we value our customers, for an interruption of a significant length of time that is within our reasonable control, upon your request we will provide what we reasonably determine to be a fair and equitable adjustment to your account to make up for such Service interruption. THIS WILL BE YOUR SOLE REMEDY AND OUR SOLE DUTY IN SUCH CASES.

(b) Disclaimers. EXCEPT AS EXPRESSLY PROVIDED HEREIN, WE MAKE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, REGARDING ANY SERVICE OR YOUR RECEIVING EQUIPMENT. ALL SUCH WARRANTIES OR REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT ARE DISCLAIMED.

(c) Limitations of Liability. WE ARE NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE RECEIVING EQUIPMENT OR ANY SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE, REGARDLESS OF THE CAUSE. OUR TOTAL LIABILITY FOR DAMAGES OR LOSSES TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE WILL IN NO EVENT EXCEED THE AMOUNT THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. You may have greater rights than described above under you state's laws. We should consult them.

(d) Warranty Services. You agree that this Agreement does not provide for, and the Service does not include, any warranty services or other services that we might provide separately, including, without limitation, any fee-based or other warranty programs.

9. RESOLVING DISPUTES

In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim relating to this Agreement, any addendum, or your Service (referred to as a "Claim") will be resolved as follows:

(a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 9(d) below) for at least 60 days after one of us notifies the other of a Claim in writing. You will send your notice to the address on the first page of this Agreement, and we will send our notice to your billing address.

(b) Formal Resolution. Except as provided in Section 9(d), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated (referred to as the "JAMS Rules") and under the rules set forth in this Agreement. If there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. **ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL.** You may, in arbitration, seek any and all remedies otherwise available to you pursuant to your state's law. If you decide to initiate arbitration, you agree to tell us in writing the amount that you would say to fee a lawsuit against us in the appropriate court of law in your state. Unless we agree to pay your fee for you, you only need to pay an arbitration invitation fee equal to such court filing fee, not to exceed $125. we agree to pay any additional fee or deposit required by JAMS to initiate your arbitration. We also agree to pay the costs of the arbitration proceeding. Other fees, such as attorney's fees and expenses of travel to the arbitration, will be paid in accordance with JAMS Rules. The arbitration will be held at a location in your hometown area unless you and we both agree to another location or telephonic arbitration. To start an arbitration, you or we must do the following things:

(1) write a Demand for Arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered. You can find a copy of a Demand for Arbitration at jamsadr.com.

(2) Send three copies of the Demand for Arbitration, plus the appropriate filing fee, to:

JAMS
500 North State College Blvd., Suite 600
Orange, CA 92868
1-800-352-5267

(3) Send one copy of the demand for arbitration to the other party.

(c) Special Rules. (i) In the arbitration proceeding, the arbitrator has no authority to make errors of law, and any award may be challenged if the arbitrator does so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. (ii) Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

(d) Exceptions. Notwithstanding the foregoing: (i) any Claim based on Section 7(h) above, and (ii) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 or any other statement or law governing theft of service, may be decided only by a court of competent jurisdiction.

10. MISCELLANEOUS

(a) Notice. Notices to you will be deemed given when personally delivered, addressed to you at your last known address and deposited in the U.S. Mail (which may include inclusion in your billing statement), or sent via Internet to the e-mail address you provided us or sent via satellite to your receiver or delivered when a voice message is left at the telephone number on your account. Your notices to us will be deemed given when we receive them at the address or telephone number on the first page of this Agreement.

(b) Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

(c) Assignment of Account. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including, without limitation, collection of unpaid amounts, or in the event of an acquisition, corporate reorganization, merger or sale of substantially all of the party's assets to another entity. You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

(d) Other. The Agreement and any lease, activation, programming, or other service commitment agreement that you entered into in connection with obtaining Receiving Equipment constitute our entire agreement. No salesperson or other representative is authorized to change it. If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable. The terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU.

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CUSTOMER AGREEMENT

[Effective as of April 24, 2010, and replaces]

THIS DESCRIBES THE TERMS AND CONDITIONS OF YOUR RECEIPT AND PAYMENT OF DIRECTV® SERVICE AND IS SUBJECT TO ARBITRATION (SECTION 9) AND DISCLAIMER OF WARRANTIES (SECTION 8). IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR SERVICE. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THEY WILL BE LEGALLY BINDING. IF YOU OBTAINED RECEIVING EQUIPMENT DURING OR AFTER MARCH 2006, THE EQUIPMENT LEASE ADDENDUM, AVAILABLE AT DIRECTV.COM, GOVERNS YOUR RECEIPT, USE, AND RETURN OF EQUIPMENT. TO VIEW BOTH AGREEMENTS IN SPANISH, VISIT DIRECTV.COM/ACUERDO OR CALL 1-888-388-8822 TO REQUEST A PRINTED COPY. (VISITE A DIRECTV.COM/ACUERDO O LLAME AL 1-888-388-8822 PARA SOLICITAR ESTE DOCUMENTO.)

CONTACTING DIRECTV:

You may contact us 24 hours a day, any day of the year, by sending us an e-mail at directv.com/emailus or by writing to:

DIRECTV, Inc.
Customer Service
P.O. Box 6550
Greenwood Village, CO 80155-6550

You can also call us at 1-800-531-5000 and speak your request into our Automated Phone System, e.g., for technical issues – say "technician"; for on-screen messages – say the extension or message you see on your TV screen; to pay your bill – say "pay my bill"; for programming questions – say the name of the package or service, etc. For bill inquiries, call hours are 8am - 8pm (your local time) Sun - Fri and 8am - 12:30am ET on Sat.

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These are the terms on which we will provide you Service:

(a) Program Choices. You must subscribe to a base package in order to receive additional Services such as premium movie services or sports subscriptions. All programming selections have their own rules, terms and conditions. Information about programming is at directv.com.

(b) Ordering Pay-Per-View. You may order Pay Per View Services by using your on-screen guide and remote control, by ordering at directv.com, by calling us and speaking the name of your event into our Automated Phone System, or by ordering through an agent. Programs recorded to a DVR may automatically delete after 24 hours. If you call an agent to order, the maximum fee may apply (described in Section 2). A reduced fee is available for Pay Per View orders placed at directv.com or through the Automated Phone System. To use your remote control to order, your receiver must be continuously connected to a land-based telephone line. Your order is transmitted via the telephone line, and during the short transmission period, you may not be able to use the line for other purposes. Repeated cancellation of previously ordered Pay Per View Services may result in cancellation of your account, restrictions on your ability to order Pay Per View Services, or imposition of additional fees for Pay Per View Services.

(c) Your Programming Changes. You may change your programming selection by notifying us. A fee may apply to such changes (described in Sections 2 & 5(b)). Some programming may be purchased in minimum blocks of one month or multiples of one month.

(d) Our Programming Changes. Many factors affect the availability, cost and quality of programming and may influence the decision to raise prices and the amount of any increase. These include, among others, programming and other costs, consumer demand, market and shareholder expectations, and changing business conditions. Accordingly, we must reserve the unrestricted right to change, rearrange, add or delete our programming packages, the selections in those packages, our prices, and any other Service we offer, at any time. We will endeavor to notify you of any change that is within our reasonable control and its effective date. In most cases this notice will be about one month in advance. You always have the right to cancel your Service, in whole or in part. If you do not accept the change (see Section 5), if you cancel your Service, a deactivation fee (described in Sections 2 & 5(b)) or other charges may apply. Credits, if any, to your account will be posted as described in Section 5. If you do not cancel, your continued receipt of our Service will constitute acceptance.

(e) Access Card. You have received a conditional access card (referred to as the "Access Card") and a License Agreement governing your use of the Access Card while you are receiving our Service. Access Cards are nontransferable and are the exclusive property of DIRECTV. If you tell us that the original Access Card was lost, damaged, defective or stolen, we will replace it, as long as there is no evidence of unauthorized tampering with or modification of the Access Card and your account is in good standing. A replacement fee may apply (described in Section 2). Tampering with or other unauthorized modification of the Access Card is strictly prohibited and may result in criminal or civil action. Tampering with or inserting any device into your receiver other than an authorized unmodified Access Card is prohibited. DIRECTV reserves the right to cancel or replace the Access Card. Upon request, the card must be returned to DIRECTV. If you do not return the Access Card to DIRECTV when you cancel your Service, you may be charged a fee as described in Section 2. Requesting Access Cards on behalf of other persons or for purposes other than lawful viewing of DIRECTV Service is prohibited.

(f) Phone Connections. For optimal performance of your Receiving Equipment, including ordering with your remote control or receiving certain Services, each of your receivers must be directly connected to the same land-based telephone line. If you add Service for additional TVs, you may purchase a separate subscription for each additional TV, or, if all your receivers are continuously connected to the same land-based telephone line, we can "mirror" programming to your additional TVs and charge you only the fee amount described in Section 2. You agree to provide true and accurate information about the location of your receivers. If we detect that any receiver is not regularly connected to a land-based telephone line, we may investigate and, if it is determined that the receiver is not at the location identified on your account, we may disconnect the receiver or charge you the full programming subscription price for the receiver.

(g) Mobile Units. We provide Service to Receiving Equipment installed in mobile units such as campers, boats and other recreational vehicles. However, this Receiving Equipment is not eligible for the additional TV authorization discount described in Section 1(f).

(h) Private Viewing. We provide Service only for your private, non-commercial use, enjoyment and home viewing. The programming may not be viewed in areas open to the public or in commercial establishments. You may not rebroadcast, transmit or perform the programming, charge admission for its viewing or transmit, or distribute running accounts of it. You may not use any of our trademarks. Notwithstanding the provisions of Section 9, we or any programming provider may prosecute violations of the foregoing against you and other responsible parties in any court of competent jurisdiction, under the rules and regulations of the Federal Communications Commission and other applicable laws.

(i) Blackouts. Certain programming, including sports events, may be blacked out in your local reception area. Blackout restrictions are decided by the sports leagues and the other entities that own the local broadcast rights. You may visit directv.com for more blackout information. If you circumvent or attempt to circumvent any of these blackouts, you may be subject to legal action.

(j) Loss of Receiving Equipment. You should notify us immediately if your receiver, remote control or receiving antenna dish (referred to collectively as "Receiving Equipment") is lost or stolen. If you notify us within 5 days, we will not charge you for unauthorized use. In any case, we will not charge you for unauthorized use occurring after we receive your notice. For leased Receiving Equipment, non-return fees as specified in the Equipment Lease Addendum will apply.

(k) Transfer of Receiving Equipment. We consider you to be responsible for, and the recipient of programming on, any Receiving Equipment you own. You are liable for charges incurred in the use of your Receiving Equipment by others until you notify us of a transfer. Leased Receiving Equipment may not be transferred.

(l) Your Viewing Restrictions. It is your responsibility to impose any viewing restrictions on other family members or guests, as you think appropriate. We are not responsible to you or anyone else based on the content of our programming. Please visit directv.com for information on parental controls, locks and limits and password protection on your account.

(m) Change of Address. You must notify us immediately of any change in your name, mailing address, residence address or telephone number.

2. PAYMENT

In return for receiving our Service, you promise to pay us as follows:

(a) Programming. You will pay in advance, at our rates in effect at the time for all Service ordered by you or anyone who uses your Receiving Equipment, with or without your permission, until the Service is canceled. The outstanding balance is due in full each month. To establish service, you were required to provide a credit card. You may use this or another credit or debit card to establish recurring payments. See Section 5(a) regarding payment upon cancellation. We may, in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. No "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us. We may reduce your Service to a minimum service level, at our rates in effect at the time.

or deactivate your Service if you do not pay your statements on time, after any applicable grace period.

(b) Taxes. You will pay all state and local taxes or other governmental fees and charges, if any, which are assessed.

(c) Administrative Fees. To control the basic charges which apply to all customers, we may charge fees that arise in specific circumstances only to those customers responsible for them. The list below is not exclusive, and DIRECTV reserves the right to modify these fees or charge additional fees. **In each case, we will charge you the lesser of the fee listed or the maximum amount permitted under applicable law:**

(1) *Up to $100 Account Activation Fee*, upon activation of your Service account.

(2) *Up to $300 Access Card Replacement Fee*, if you lose or fail to return your Access Card (a partial credit may be posted to your account if the Access Card is later returned). If you request overnight delivery of a replacement Access Card, a shipping and handling fee of up to $16.50 applies.

(3) *Up to $5.00 Additional TV Authorization Fee* in connection with obtaining Service on each additional TV connected to Receiving Equipment you own, provided you meet the qualifications specified in Section 1(f) and the Receiving Equipment is located at your residence. Customers with leased Receiving Equipment do not pay this fee, but pay the Lease Fee specified in the Equipment Lease Addendum.

(4) ***Up to $5.00 Late Fee:*** **If we do not receive your payment by the due date on your bill, we may charge you an administrative late fee of (i) $5.00; or (ii) the maximum amount permitted under and subject to applicable law per month or partial month until the delinquent amount is paid in full.** This late fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature. You acknowledge that this fee is reasonably related to the actual expense we incur due to late payment and may be subject to limitations as set forth by the law in your state.

(5) *Up to $10.00 Change of Service Fee*, if you change your Service package to a lower-priced package. See also Section 5(b).

(6) *Up to $10.00 Phone Payment Fee*, if you elect to pay any outstanding balance over the telephone with an agent. To avoid this fee, you can pay your bill through our Automated Phone System by saying "Pay my bill," or at directv.com.

(7) *Deposits*: We may require that you provide a deposit prior to or after activation of your Service, which we may apply against any unpaid amount at any time. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.

(8) *Up to $5.00 Order Assistance Fee*, if you order a Pay Per View Service by calling and speaking with an agent. A fee of up to $1.50 may apply if you order via our Automated Phone System. Fees are per movie, event or program so ordered, even if later canceled. There is no order assistance fee for orders placed at directv.com.

(9) *Up to $15.00 Deactivation Fee* if you cancel your Service or we deactivate your Service because of your failure to pay or for some other breach on your part.

(10) *Up to $1.75 Duplicate Statement Fee* for each statement request.

(11) *Up to $2.75 Ledger Request Fee* for ledger itemizing past payments on your account.

(12) *Up to $20.00 Returned Payment Fee*, if any bank or other financial institution refuses to honor any payment, draft or instrument submitted for payment on your account. You acknowledge that this fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expense we incur due to unsatisfied payment.

(d) Billing Statements. We will send you a statement for each billing cycle (usually once every 30 days) unless you have a zero or nominal balance due, or a nominal credit balance, on your account at the end of a billing cycle. Statements will show: (1) payments, credits, purchases and any other charges to your account, (2) the amount you owe us and (3) the payment due date. If you elect to make automatic credit or debit card payments, you will not receive monthly statements unless you request that they be sent.

(e) Questions About Your Statement. If you think your statement is incorrect or if you need more information about it, contact us immediately. We will try to resolve any complaints you have as promptly as we can.

You must contact us within 60 days of receiving the statement in question. Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible reduction or deactivation of Service.

Remember, if your bill for DIRECTV Service comes from a party other than DIRECTV, please use the correct information on your bill.

(f) Consents Regarding Credit. In order to establish an account with us, you authorize us to inquire into your creditworthiness (subject to Section 6), by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or nonpayment to credit reporting agencies. Due to the subjective nature of creditworthiness, we reserve the right to require prepayment for any Service via cashier's check, money order or credit card, notwithstanding your credit rating, past history or practice.

(g) Collection Costs. To the extent permitted by law, you will pay us any costs and fees we reasonably incur to collect amounts you owe us.

3. CUSTOMER INFORMATION

(a) Representations. You represent that you are at least 18 years of age and a resident of the United States.

(b) Contact Information. You agree to provide true, accurate, current and complete contact information about yourself, and maintain and promptly update your contact information to keep it true, accurate and complete.

(c) Online Access. You are responsible for maintaining the confidentiality of the password and account e-mail address used for online billing and account maintenance at directv.com, and are fully responsible for all activities that occur under your password and account. You agree to: (i) keep your e-mail address and password confidential and not share them with anyone else; (ii) immediately notify DIRECTV of any unauthorized use of your password and account or other breach of security and (iii) use only your e-mail address and password to log in to directv.com.

4. CHANGES IN CONTRACT TERMS

We reserve the right to change the terms and conditions on which we offer Service. If we make any such changes, we will send you a copy of your new Customer Agreement containing its effective date. You always have the right to cancel your Service, in whole or in part, at any time, and you may do so if you do not accept any such changed terms or conditions. See Sections 5(b), (d) and (e) below. If you elect not to cancel your Service after receiving a new Customer Agreement, your continued receipt of Service constitutes acceptance of the changed terms and conditions. If you notify us that you do not accept such terms and conditions, then we may cancel your Service as provided in Section 5, as we cannot offer Service to different customers on different terms, among other reasons.

5. CANCELLATION

(a) Term. The term of this Agreement is indefinite and Service will continue until canceled as provided herein. UNLESS YOU NOTIFY US THAT YOU WISH TO CANCEL IT, WE WILL AUTOMATICALLY RENEW SERVICE THAT YOU SUBSCRIBE TO ON A PERIODIC BASIS, INCLUDING ANY MONTHLY OR ANNUAL SUBSCRIPTIONS AND SEASONAL SPORTS SUBSCRIPTIONS, AS LONG AS WE CONTINUE TO CARRY THE SERVICE.

(b) Your Cancellation. You may cancel Service by notifying us. You may be charged a deactivation fee as described in Section 2 and issued a credit as described below. Your notice is effective on the day we receive it. You will still be responsible for payment of all outstanding balances accrued through that effective date. In addition to any deactivation or change of service fees provided in Section 2, if you cancel Service or change your Service package, you may be subject to an early cancellation fee if you entered into a programming commitment with DIRECTV in connection with the Equipment Lease Addendum, and have failed to maintain the required programming package for the required period of time. For Services sold only in blocks of one month or multiples of one month, if you cancel such Service, we will credit you only for full months not used. For example, if you subscribe for a year of such Service from January through December but cancel on March 10, we will credit you for the subscription fees for April through December. However, we will not credit any fees for January through March. Additionally, we will not credit seasonal sports subscriptions after the season starts.

(c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, breach any other material provision of this Agreement, or act abusively toward our staff. In such case, you will still be responsible for payment of all outstanding balances accrued through that effective date, including the deactivation fee described in Section 2. In addition, we may cancel your Service if you elect not to accept any changed terms described to you, as provided in Section 4.

(d) Credit Balances. When your account is closed, we will review your account and refund any excess monetary payments. Unused portions of retention or similar credits will not be refunded. If your credit balance is less than $1.00 we will not issue you a refund unless you make a written request for the refund. If you do not make such a written request for the refund within one year of the close of your account, you forfeit any credit balance remaining on your account and your account balance will be reset to zero.

(e) Payment Upon Cancellation. You acknowledge that you have provided your credit or debit card account information to us. You understand that you will incur fees and charges as a result of your receipt and use of Service and/or Receiving Equipment, and may incur early cancellation fees and/or equipment non-return fees (as specified in any lease, programming or other service commitment agreement you entered into in connection with obtaining Receiving Equipment). By giving us your credit or debit card account information, you authorize us to apply this method of payment, in accordance with applicable law, to satisfy any and all amounts due upon cancellation. You further acknowledge that you are required to maintain current credit or debit card information with us and agree to notify us whenever there is a change in such information, such as a change in the card number or the expiration date.

6. PERSONAL DATA

We collect Personally Identifiable Information about our customers ("Personal Data"). The use and disclosure of this Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy

Policy, by this Agreement. A copy of our Privacy Policy is available at directv.com. We will also send you a copy if you send your written request to this address: DIRECTV Privacy Policy, P.O. Box 6550, Greenwood Village, CO 80155-6550.

7. DIRECTV® DVR SERVICE AND SOFTWARE LICENSE

DIRECTV DVR Service is a separately sold service, at our option in effect at the time, available to customers with DVR-enabled Receiving Equipment. DIRECTV DVR Service gives you the ability to see and record television programs ("Third Party Content"). You understand that DIRECTV does not guarantee the access to or recording of any particular program, or the length of time any particular recorded program may remain available for your viewing. You also understand that Third Party Content is the copyrighted material of the third party that supplies it, is protected by copyright and other applicable laws, and may not be reproduced, published, broadcast, rewritten or redistributed without the written permission of the third party that supplied it, except to the extent allowed under the "fair use" provisions of the U.S. copyright laws or comparable provisions of foreign laws. You agree that DIRECTV will have no liability to you, or anyone else who uses your DIRECTV DVR Service, with regard to any Third Party Content. DIRECTV may, at its discretion, from time to time change, add or remove features of the DIRECTV DVR Service, or change the service fee for DIRECTV DVR Service.

We generally use local telephone calls to provide the DIRECTV DVR Service. You are responsible for such telephone charges and acknowledge and agree that you shall be solely responsible for all disputes with any telephone company related to the same.

If you paid a "lifetime service fee," you will not be charged a fee for your DIRECTV DVR Service as long as you maintain television programming service from DIRECTV on the same account. If you disconnect your DIRECTV television programming service and later reconnect on the same account, your DIRECTV DVR Service will be reconnected and you will not be charged a fee for DIRECTV DVR Service.

The DIRECTV Receiving Equipment incorporates Software which is owned by DIRECTV or its third party licensors. Before using the Receiving Equipment or activating the DIRECTV DVR Service, please read the terms and conditions for use of the Software. If you do not agree to these terms you may not use the Receiving Equipment and may not activate the DIRECTV DVR Service and should immediately return the Receiving Equipment to DIRECTV or your supplier. These terms also apply to any modifications, updates or supplements to the Software provided to you. Below is a summary of the terms of the Software license. A complete text of the terms and conditions for use of the Software is located in the user manual and at directv.com.

(a) License Grant and Conditions. DIRECTV grants you a non-exclusive, non-transferable, limited license to use the Software solely in executable code form and solely as integrated with, incorporated into, and in conjunction with the Receiving Equipment. Certain third party Software used in connection with the Receiving Equipment may be made directly available to you by the providers thereof. DIRECTV reserves the right to modify, supplement, update and otherwise alter the Software via software download or other modification procedures, and these terms will apply to such Software as modified, supplemented, updated, and otherwise altered.

(b) License Restrictions. You may not copy, modify or transfer the Software, or any copy thereof, in whole or in part. You may not reverse engineer, disassemble, decompile or translate the Software, or otherwise attempt to derive the source code of the Software, except to the extent allowed under any applicable law. The Software may include some components that are covered by "free software" licenses, open source software, and other similar license use rights which require such components to be used, modified and/or distributed only under the terms of such licenses.

(c) Ownership of Software and Reservation of Rights. The Software is licensed, not sold, to you for use only under the terms of this license agreement. DIRECTV is NOT transferring title or any ownership rights in the Software to you, and DIRECTV and its suppliers reserve all rights not expressly granted to you. Except as stated above, this license agreement does not grant to you any intellectual property rights in the Software.

(d) Termination. These terms are effective until terminated. You may terminate these terms by returning the Receiving Equipment to DIRECTV or your supplier. These terms will terminate automatically without notice if you fail to comply with these terms or any other agreement between you and DIRECTV. Upon termination you must return the Receiving Equipment to DIRECTV or your supplier.

(e) Disclaimer. THE SOFTWARE IS TO THE EXTENT PERMITTED BY LAW SUPPLIED "AS IS". NEITHER DIRECTV NOR ANY OF ITS LICENSORS EXPRESSLY MAKES OR PASSES ON TO YOU ANY WARRANTY OR REPRESENTATION ON BEHALF OF DIRECTV OR ITS LICENSORS WITH RESPECT TO THE SOFTWARE, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES, EXPRESS OR IMPLIED, INCLUDING (BUT NOT LIMITED TO) ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS.

(f) Limitation of Liability. IN NO EVENT WILL DIRECTV OR ITS LICENSORS BE LIABLE TO YOU WITH RESPECT TO THE SOFTWARE FOR ANY DIRECT, INDIRECT, CONSEQUENTIAL, SPECIAL, PUNITIVE OR INCIDENTAL DAMAGE (INCLUDING LOSS OF PROFITS, LOST SAVINGS, LOSS OF DATA OR THE COST OF PROCUREMENT OF SUBSTITUTE GOODS, TECHNOLOGY OR SERVICES) ARISING OUT OF THE USE OR THE INABILITY TO USE THE SOFTWARE, EVEN IF DIRECTV OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY A THIRD PARTY. Some states or jurisdictions do not allow the exclusion or limitation of incidental, consequential or special damages, so the above limitations may not apply to you.

(g) Additional Information. DIRECTV's licensors and suppliers shall be third party beneficiaries of these license terms, as applicable. Certain additional terms and information for the Software and certain third party software (including the text of licenses applicable to any free, open source and other similar software that may be included in the Software) may be found in the DIRECTV website located at directv.com, and the GNU website located at www.gnu.org.

(h) Third-Party Beneficiary. DIRECTV and you expressly acknowledge and agree that TiVo, Inc., a Delaware corporation with its principal place of business at 2160 Gold Street, Alviso, CA 95002, is an intended third-party beneficiary of this license agreement as it relates to TiVo software that may be contained in the Receiving Equipment. These license provisions are made expressly for the benefit of TiVo and are enforceable by TiVo in addition to DIRECTV.

8. LIMITS ON OUR RESPONSIBILITY

(a) Service Interruptions. Service may be interrupted from time to time for a variety of reasons. We are not responsible for any interruptions of Service that occur due to acts of God, power failure or any other cause beyond our reasonable control. However, because we value our customers, for an interruption of a significant length of time that is within our reasonable control, upon your request we will provide what we reasonably determine to be a fair and equitable adjustment to your account to make up for such Service interruption. THIS WILL BE YOUR SOLE REMEDY AND OUR SOLE DUTY IN SUCH CASE.

(b) Disclaimers. EXCEPT AS EXPRESSLY PROVIDED HEREIN, WE MAKE NO WARRANTY OR REPRESENTATION, EITHER EXPRESS OR IMPLIED, REGARDING ANY SERVICE OR YOUR RECEIVING EQUIPMENT, WHICH IS PROVIDED TO YOU AS IS. ALL SUCH WARRANTIES OR REPRESENTATIONS, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT ARE DISCLAIMED. YOU ARE RESPONSIBLE FOR THE LOSS OF OR ANY DAMAGE TO THE RECEIVING EQUIPMENT.

(c) Limitations of Liability. WE ARE NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE RECEIVING EQUIPMENT OR ANY SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE. REGARDLESS OF THE CAUSE, OUR TOTAL LIABILITY FOR DAMAGES OR LOSSES TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE WILL IN NO EVENT EXCEED THE AMOUNT THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. You may have greater rights than described above under your state's laws. You should consult them.

(d) Warranty Services. You agree that this Agreement does not provide for, and the Service does not include, any warranty services or other services that we might provide separately, including, without limitation, any fee based or other warranty programs.

9. RESOLVING DISPUTES

In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim resulting to this Agreement, any addendum, or your Service (referred to as a "Claim") will be resolved as follows:

(a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 9(d) below) for at least 60 days after one of us notifies the other of a Claim in writing. You will send your notice to the address on the first page of this Agreement, and we will send our notice to your billing address.

(b) Forms; Resolution. Except as provided in Section 9(d), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated (referred to as the "JAMS Rules") and under the rules set forth in this Agreement. If there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL. You may, in arbitration, seek any and all remedies otherwise available to you pursuant to your state's law. If you decide to initiate arbitration, you agree to tell us in writing the amount that you would pay to file a lawsuit against us in the appropriate court of law in your state. Unless we agree to pay your fee for you, you only need to pay an arbitration initiation fee equal to such court filing fee, not to exceed $125, we agree to pay any additional fee or deposit required by JAMS to initiate your arbitration. We also agree to pay the costs of the arbitration proceeding. Other fees, such as attorney's fees and expenses of travel to the arbitration, will be paid in accordance with JAMS Rules. The arbitration will be held at a location in your hometown area unless you and we both agree to another location or telephonic arbitration. To start an arbitration, you or we must do the following things:

(1) Write a Demand for Arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered. You can find a copy of a Demand for Arbitration at jamsadr.com.

(2) Send three copies of the Demand for Arbitration, plus the appropriate filing fee, to:

JAMS
500 North State College Blvd., Suite 600
Orange, CA 92868
1-800-352-5267

(3) Send one copy of the demand for arbitration to the other party.

(c) Special Rules. (i) In the arbitration proceeding, the arbitrator has no authority to make errors of law, and any award may be challenged if the arbitrator does so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. (ii) Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

(d) Exceptions. Notwithstanding the foregoing: (i) any Claim based on Section 1(k) above; and (ii) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 or any other statement or law governing theft of service, may be decided only by a court of competent jurisdiction.

10. MISCELLANEOUS

(a) Notice. Notices to you will be deemed given when personally delivered, addressed to you at your last known address and deposited in the U.S. Mail (which may include inclusion in your billing statement), or sent via Internet to the e-mail address you provided us or sent via satellite to your receiver or delivered when a voice message is left at the telephone number on your account. Your notices to us will be deemed given when we receive them at the address or telephone number on the first page of this Agreement.

(b) Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

(c) Assignment of Account. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including, without limitation, collection of unpaid amounts, or in the event of an acquisition, corporate reorganization, merger or sale of substantially all of the party's assets to another entity. You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

(d) Other. This Agreement and any lease, activation, programming, or other service commitment agreement that you entered into in connection with obtaining Receiving Equipment constitute our entire agreement. No salesperson or other representative is authorized to change it. If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable. The terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU.

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DIRECTV CUSTOMER AGREEMENT

Effective as of April 24, 2011, until replaced

THIS DISCLOSES THE TERMS AND CONDITIONS OF YOUR RECEIPT AND PAYMENT OF DIRECTV® SERVICE AND IS SUBJECT TO ARBITRATION (SECTION 8) AND DISCLAIMER OF WARRANTIES (SECTION 9). IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR ORDER OR SERVICE. IF YOU INSTEAD DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THEY WILL BE LEGALLY BINDING. IF YOU OBTAINED RECEIVING EQUIPMENT DURING OR AFTER MARCH 2008, THE EQUIPMENT LEASE AGREEMENT, AVAILABLE AT DIRECTV.COM, GOVERNS YOUR RECEIPT, USE, AND RETURN OF EQUIPMENT. TO VIEW BOTH AGREEMENTS IN ESPAÑOL, VISIT DIRECTV.COM/ACUERDO OR CALL 1-888-388-8822 TO REQUEST A PRINTED COPY. (VISITE A DIRECTV.COM/ACUERDO O LLAME AL 1-888-388-8822 PARA SOLICITAR ESTE DOCUMENTO.)

CONTACTING DIRECTV:

You may contact us 24 hours a day, any day of the year, by sending us an e-mail at directv.com/email or by writing to:

DIRECTV, Inc.
Customer Service
P.O. Box 6550
Greenwood Village, CO 80155-6550

You can also call us at 1-800-531-5000 and speak your request into our Automated Phone System, e.g., for technical issues – say "technical"; for on-screen messages – say the extension or message you see on your TV screen; to pay your bill – say "pay my bill"; for programming questions – say the name of the package or service, etc. For bill inquiries, call hours are 8am - 10pm (your local time), Sun - Fri and 8am - 12:30am ET on Sat.

If your bill for DIRECTV Service comes from a party other than DIRECTV, please use the contact information provided on your bill for any questions about your DIRECTV Service.

Thank you for choosing DIRECTV. DIRECTV provides digital satellite entertainment programming and services (referred to collectively as "Service") to residents of the United States. We do not provide Service to addresses outside of the United States.

CUSTOMER AGREEMENT

1. OUR SERVICE

These are the terms on which we will provide you Service.

(a) Package Choices. You must subscribe to a base package in order to receive additional Services such as premium movie services or sports subscriptions. All programming selections have their own rates, terms and conditions. Information about programming is at directv.com.

(b) Ordering Pay-Per-View. You may order Pay-Per-View Services by using your on-screen guide and remote control, by ordering at directv.com, by calling us and speaking the name of your event into our Automated Phone System, or by ordering through an agent. Programs recorded to a DVR may automatically delete after 24 hours. If you call an agent to order, the installment fee may apply (described in Section 2). A reduced fee is available for Pay-Per-View orders placed at directv.com or through the Automated Phone System. To use your remote control to order, your receiver must be continuously connected to a land-based telephone line. Your order is transmitted via the telephone line, and during the short transmission period, you may not be able to use the line for other purposes. Repeated cancellation of previously ordered Pay-Per-View Services may result in cancellation of your account, restrictions on your ability to order Pay-Per-View Services, or imposition of additional fees for Pay-Per-View Services.

(c) Your Programming Changes. You may change your programming selection by notifying us. A fee may apply to such changes (described in Sections 2 & 5(d)). Some programming may be purchased in minimum blocks of one month or multiples of one month.

(d) Our Programming Changes. Many factors affect the availability, cost and quality of programming and may influence the decision to raise prices and the amount of any increase. Those include, among others, programming and other costs, consumer demand, market and shareholder expectations, and changing business conditions. Accordingly, we must reserve the unrestricted right to change, rearrange, add or delete our programming packages, the selections in those packages, our prices, and any other Service we offer, at any time. We will endeavor to notify you of any change that is within our reasonable control and its effective date. In most cases this notice will be about one month in advance. You always have the right to cancel your Service, in whole or in part. If you do not accept the change (see Section 5), if you cancel your Service, a deactivation fee (described in Sections 2 & 5(d)) or other charges may apply. Credits, if any, to your account will be posted as described in Section 5. If you do not cancel, your continued receipt of our Service will constitute acceptance.

(e) Access Card. You have received a conditional access card (referred to as the "Access Card") and a License Agreement governing your use of the Access Card while you are receiving our Service. Access Cards are non-transferable and are the exclusive property of DIRECTV. If you tell us that the original Access Card was lost, damaged, defective or stolen, we will replace it, as long as there is no evidence of unauthorized tampering with or modification of the Access Card and your account is in good standing. A replacement fee may apply (described in Section 2). Tampering with or other unauthorized modification of the Access Card is strictly prohibited and may result in criminal or civil action. Tampering with or inserting any device into your receiver other than an authorized unmodified Access Card is prohibited. DIRECTV reserves the right to cancel or replace the Access Cards. Upon request, the card must be returned to DIRECTV. If you do not return the Access Card to DIRECTV when you cancel your Service, you may be charged a fee as described in Section 2. Requesting Access Cards on behalf of other persons or for purposes other than lawful viewing of DIRECTV Service is prohibited.

(f) Phone Connections. For optimal performance of your Receiving Equipment, including ordering with your remote control or receiving certain Services, each of your receivers must be directly connected to the same land-based telephone line. If you add Service or additional TVs, you may purchase a separate subscription for each additional TV, or, if all your receivers are continuously connected to the same land-based telephone line, we can "mirror" programming to your additional TVs and charge you only the fee amount described in Section 2. You agree to provide true and accurate information about the location of your receivers. If we detect that any receiver is not regularly connected to a land-based telephone line, we may investigate and, if it is determined that the receiver is not at the location identified on your account, we may disconnect the receiver or charge you the full programming subscription price for the receiver.

(g) Mobile Units. We provide Service to Receiving Equipment installed in mobile units such as campers, boats and other recreational vehicles. However, this Receiving Equipment is not eligible for the additional TV authorization discount described in Section 1(h).

(h) Private Viewing. We provide Service only for your private non-commercial use, enjoyment and home viewing. The programming may not be viewed in areas open to the public or in commercial establishments. You may not rebroadcast, transmit or perform the programming, charge admission for its viewing or transmit or distribute viewing accounts of it. You may not use any of our trademarks. Notwithstanding the provisions of Section 9, we or any programming provider may prosecute violations of the foregoing against you and other responsible parties in any court of competent jurisdiction, under the rules and regulations of the Federal Communications Commission and other applicable laws.

(i) Blackouts. Certain programming, including sports events, may be blacked out in your local reception area. Blackout restrictions are decided by the sports leagues and the other entities that own the local broadcast rights. You may visit directv.com for more blackout information. If you circumvent or attempt to circumvent any of these blackouts, you may be subject to legal action.

(j) Loss of Receiving Equipment. You should notify us immediately if your receiver, remote control or receiving antenna dish (referred to collectively as "Receiving Equipment") is lost or stolen. If you notify us within 5 days, we will not charge you for unauthorized use. In any case, we will not charge you for unauthorized use occurring after we receive your notice. For leased Receiving Equipment, non-return fees as specified in the Equipment Lease Agreement will apply.

(k) Transfer of Receiving Equipment. We consider you to be responsible for, and the recipient of programming on, any Receiving Equipment you own. You are liable for charges incurred in the use of your Receiving Equipment by others until you notify us of a transfer. Leased Receiving Equipment may not be transferred.

(l) Your Viewing Restrictions. It is your responsibility to impose any viewing restrictions on other family members or guests, as you think appropriate. We are not responsible to you or anyone else based on the content of our programming. Please visit directv.com for information on parental controls, locks and timers and password protection on your account.

(m) Change of Address. You must notify us immediately of any change in your name, mailing address, residence address or telephone number.

2. PAYMENT

In return for receiving our Service, you promise to pay us as follows:

(a) Programming. You will pay in advance, at our rates in effect at the time for all Service ordered by you or anyone who uses your Receiving Equipment, with or without your permission, until the Service is canceled. The outstanding balance is due in full each month. To establish service, you were required to provide a credit card. You may use this or another credit or debit card to establish recurring payments. See Section 5(b) regarding payment upon cancellation. We may, in our discretion, accept partial payments, which will be applied to the oldest outstanding statement. No "payment in full" notation or other restrictive endorsement written on your payments will restrict our ability to collect all amounts owing to us. We may reduce your Service to a minimum service level, at our rates in effect at the time, or deactivate your Service if you do not pay your statements on time, after any applicable grace period.

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(b) Taxes. You will pay all state and local taxes or other governmental fees and charges, if any, which are assessed.

(c) Administrative Fees. To control the basic charges which apply to all customers, we may charge fees that arise in specific circumstances only to those customers responsible for them. The list below is not exclusive, and DIRECTV reserves the right to modify these fees or charge additional fees. **In each case, we will charge you the lesser of the fee listed or the maximum amount permitted under applicable law:**

(1) *Up to $100 Account Activation Fee*, upon activation of your Service account.

(2) *Up to $300 Access Card Replacement Fee*, if you lose or fail to return your Access Card (a partial credit may be posted to your account if the Access Card is later returned). If you request overnight delivery of a replacement Access Card, a shipping and handling fee of up to $16.50 applies.

(3) *Up to $6.00 Additional TV Authorization Fee* in connection with obtaining Service on each additional TV connected to Receiving Equipment you own, provided you meet the qualifications specified in Section 1(f) and the Receiving Equipment is located at your residence. Customers with leased Receiving Equipment do not pay this fee, but pay the Lease Fee specified in the Equipment Lease Agreement.

(4) ***Up to $5.00 Late Fee:*** **If we do not receive your payment by the due date on your bill, we may charge you an administrative late fee of (i) $5.00; or (ii) the maximum amount permitted under and subject to applicable law per month or partial month until the delinquent amount is paid in full.** This late fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature. You acknowledge that this fee is reasonably related to the actual expense we incur due to late payment and may be subject to limitations as set forth by the law in your state.

(5) *Up to $10.00 Change of Service Fee*, if you change your Service package to a lower-priced package. See also Section 5(b).

(6) *Up to $10.00 Phone Payment Fee*, if you elect to pay any outstanding balance over the telephone with an agent. To avoid this fee, you can pay your bill through our Automated Phone System by saying "Pay my bill," or at directv.com.

(7) *Deposits:* We may require that you provide a deposit prior to or after activation of your Service, which we may apply against any unpaid amount at any time. Deposits will appear on your bills as credits, from which we will deduct our charges. Deposits will not earn interest.

(8) *Up to $5.00 Order Assistance Fee*, if you order a Pay Per View Service by calling and speaking with an agent. A fee of up to $1.50 may apply if you order via our Automated Phone System. Fees are per movie, event or program as ordered, even if later canceled. There is no order assistance fee for orders placed at directv.com.

(9) *Up to $15.00 Deactivation Fee* if you cancel your Service or we deactivate your Service because of your failure to pay or for some other breach on your part.

(10) *Up to $1.75 Duplicate Statement Fee* for each statement request.

(11) *Up to £2.75 Lenger Request Fee* for lenger tlanslting past payments on your account.

(12) *Up to £20.00 Returned Payment Fee*, if any bank or other financial institution refuses to honor any payment, draft or instrument submitted for payment on your account. You acknowledge that this fee is not an interest charge, finance charge, time price differential or other such charge or payment of a similar nature and it is reasonably related to the actual expense we incur due to unsatisfied payment.

(d) Billing Statements. We will send you a statement for each billing cycle (usually once every 30 days) unless you have a zero or nominal balance due, or a nominal credit balance, on your account at the end of a billing cycle. Statements will show: (1) payments, credits, purchases and any other charges to your account, (2) the amount you owe us and (3) the payment due date. If you elect to make automatic credit or debit card payments, you will not receive monthly statements unless you request that they be sent.

(e) Questions About Your Statement. If you think your statement is incorrect or if you need more information about it, contact us immediately. We will try to resolve any complaints you have as promptly as we can.

You must contact us within 90 days of receiving the statement in question. Undisputed portions of the statement must be paid by the due date to avoid a late fee and possible reduction or deactivation of Service.

Remember, if your bill for DIRECTV Service comes from a party other than DIRECTV, please use the contact information on your bill.

(f) Consents Regarding Credit. In order to establish an account with us, you authorize us to inquire into your creditworthiness (subject to Section 6), by checking with credit reporting agencies. If you are delinquent in any payment to us, you also authorize us to report any late payment or nonpayment to credit reporting agencies. Due to the subjective nature of creditworthiness, we reserve the right to require prepayment for any Service via cashier's check, money order or credit card, notwithstanding your credit rating, past history or practice.

(g) Collection Costs. To the extent permitted by law, you will pay us any costs and fees we reasonably incur to collect amounts you owe us.

3. CUSTOMER INFORMATION

(a) Representations. You represent that you are at least 18 years of age and a resident of the United States.

(b) Contact Information. You agree to provide true, accurate, current and complete contact information about yourself, and maintain and promptly update your contact information to keep it true, accurate and complete. If you provide a cellular telephone number, you acknowledge and consent that we may call you on your cellular phone for business purposes, including collections calls.

(c) Online Access. You are responsible for maintaining the confidentiality of the password and account e-mail address used for online billing and account maintenance at directv.com, and are fully responsible for all activities that occur under your password and account. You agree to: (i) keep your e-mail address and password confidential and not share them with anyone else; (ii) immediately notify DIRECTV of any unauthorized use of your password and account or other breach of security and (iii) use only your e-mail address and password to log in to directv.com.

4. CHANGES IN CONTRACT TERMS

We reserve the right to change the terms and conditions on which we offer Service. If we make any such changes, we will send you a copy of your new Customer Agreement containing its effective date. You always have the right to cancel your Service, in whole or in part, at any time, and you may do so if you do not accept any such changed terms or conditions. See Sections 5(b), (d) and (e) below. If you elect not to cancel your Service after receiving a new Customer Agreement, your continued receipt of Service constitutes acceptance of the changed terms and conditions. If you notify us that you do not accept such terms and conditions, then we may cancel your Service as provided in Section 5, as we cannot offer Service to different customers on different terms, among other reasons.

5. CANCELLATION

(a) Term. The term of this Agreement is indefinite and Service will continue until canceled as provided herein. Unless you notify us that you wish to cancel it, we will automatically renew Service that you subscribe to on a periodic basis, including any monthly or annual subscriptions and seasonal sports subscriptions, as long as we continue to carry the Service.

(b) Your Cancellation. You may cancel Service by notifying us. You may be charged a deactivation fee as described in Section 2 and issued a credit as described below. Your notice is effective on the day we receive it. You will still be responsible for payment of all outstanding balances accrued through that effective date. In addition to any deactivation or change of service fees provided in Section 2, if you cancel Service or change your Service package, you may be subject to an early cancellation fee if you entered into a programming agreement with DIRECTV in connection with the Equipment Lease Agreement, and have failed to maintain the required programming package for the required period of time. For Services sold only in blocks of one month or multiples of one month, if you cancel such Service, we will credit you only for full months not used. For example, if you subscribe for a year of such Service from January through December but cancel on March 10, we will credit you for the subscription fees for April through December. However, we will not credit any fees for January through March. Additionally, we will not credit seasonal sports subscriptions after the season starts.

(c) Our Cancellation. We may cancel your Service at any time if you fail to pay amounts owing to us when due, subject to any grace periods, breach any other material provision of this Agreement, or act abusively towards our staff. In such case, you will still be responsible for payment of all outstanding balances accrued through that effective date, including the deactivation fee described in Section 2. In addition, we may cancel your Service if you elect not to accept any changed terms described to you, as provided in Section 4.

(d) Credit Balances. When your account is closed, we will review your account and refund any excess monetary payments. Unused portions of retention or similar credits will not be refunded. If your credit balance is less than $1.00 we will not issue you a refund unless you make a written request for the refund. If you do not make such a written request for the refund within one year of the close of your account, you forfeit any credit balance remaining on your account and your account balance will be reset to zero.

(e) Payment Upon Cancellation. You acknowledge that you have provided your credit or debit card account information to us. You understand that you will incur fees and charges as a result of your receipt and use of Service and/or Receiving Equipment, and may incur early cancellation fees and/or equipment non-return fees (as specified in any lease, programming or other service commitment agreement you entered into in connection with obtaining Receiving Equipment). By giving us your credit or debit card account information at any time, you authorize us to apply this method of payment, in accordance with applicable law, to satisfy any and all amounts due upon cancellation. You further acknowledge that you are required to maintain current credit or debit card information with us and agree to notify us whenever there is a change in such information, such as a change in the card number or the expiration date.

6. PERSONAL DATA

We collect Personally Identifiable Information about our customers ("Personal

Data"). The use and disclosure of this Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy Policy, by this Agreement. A copy of our Privacy Policy is available at directv.com. We will also send you a copy if you send your written request to this address: DIRECTV Privacy Policy, P.O. Box 6550, Greenwood Village, CO 80155-6550.

7. **DIRECTV® DVR SERVICE AND SOFTWARE LICENSE**

DIRECTV DVR Service is a separately sold service, at our rates in effect at the time, available to customers with DVR-enabled Receiving Equipment. DIRECTV DVR Service gives you the ability to see and record televised programs ("Third Party Content"). You understand that DIRECTV does not guarantee the access to or recording of any particular program, or the length of time any particular recorded program may remain available for your viewing. You also understand that Third Party Content is the copyrighted material of the third party that supplies it, is protected by copyright and other applicable laws, and may not be reproduced, published, broadcast, rewritten or redistributed without the written permission of the third party that supplied it, except to the extent allowed under the "fair use" provisions of the U.S. copyright laws or comparative provisions of foreign laws. You agree that DIRECTV will have no liability to you or anyone else who uses your DIRECTV DVR Service, with regard to any Third Party Content. DIRECTV may, at its discretion, from time to time change, add or remove features of the DIRECTV DVR Service, or change the service fee for DIRECTV DVR Service.

We generally use local telephone calls to provide the DIRECTV DVR Service. You are responsible for such telephone charges and acknowledge and agree that you shall be solely responsible for all disputes with any telephone company related to the same.

If you paid a "lifetime service fee," you will not be charged a fee for your DIRECTV DVR Service as long as you maintain television programming service from DIRECTV on the same account. If you disconnect your DIRECTV television programming service and later reconnect on the same account, your DIRECTV DVR Service will be reconnected and you will not be charged a fee for DIRECTV DVR Service.

The DIRECTV Receiving Equipment incorporates Software which is owned by DIRECTV or its third party licensors. Before using the Receiving Equipment or activating the DIRECTV DVR Service, please read the terms and conditions for use of the Software. If you do not agree to these terms you may not use the Receiving Equipment and may not activate the DIRECTV DVR Service and should immediately return the Receiving Equipment to DIRECTV or your supplier. These terms also apply to any modifications, updates or supplements to the Software provided to you. Below is a summary of the terms of the Software license. A complete text of the terms and conditions for use of the Software is located in the user manual and at directv.com.

(a) License Grant and Conditions. DIRECTV grants you a non-exclusive, non-transferable, limited license to use the Software solely in executable code form and solely as integrated with, incorporated into, and in conjunction with the Receiving Equipment. Certain third party Software used in connection with the Receiving Equipment may be made directly available to you by the providers thereof. DIRECTV reserves the right to modify, supplement, update and otherwise alter the Software via software download or other modification procedures, and these terms will apply to such Software as modified, supplemented, updated, and otherwise altered.

(b) License Restrictions. You may not copy, modify or transfer the Software, or any copy thereof, in whole or in part. You may not reverse engineer, disassemble, decompile or translate the Software, or otherwise attempt to derive the source code of the Software, except to the extent allowed under any applicable law. The Software may include some components that are covered by "free software" licenses, open source software, and other similar licenses (see rights which require such components to be used, modified and/or distributed only under the terms of such licenses.

(c) Ownership of Software and Assignment of Rights. The Software is licensed, not sold, to you for use only under the terms of this license agreement. DIRECTV is NOT transferring title or any ownership rights in the Software to you and DIRECTV and its suppliers reserve all rights not expressly granted to you. Except as stated above, this license agreement does not grant to you any intellectual property rights in the Software.

(d) Termination. These terms are effective until terminated. You may terminate these terms by returning the Receiving Equipment to DIRECTV or your supplier. These terms will terminate automatically without notice if you fail to comply with these terms or any other agreement between you and DIRECTV. Upon termination you must return the Receiving Equipment to DIRECTV or your supplier.

(e) Disclaimer. THE SOFTWARE IS TO THE EXTENT PERMITTED BY LAW SUPPLIED AS IS AND WITH ALL FAULTS. NEITHER DIRECTV NOR ANY OF ITS LICENSORS EXPRESSLY MAKES OR PASSES ON TO YOU ANY WARRANTY OR REPRESENTATION ON BEHALF OF DIRECTV OR ITS LICENSORS WITH RESPECT TO THE SOFTWARE, INCLUDING BUT NOT LIMITED TO ANY WARRANTIES, EXPRESS OR IMPLIED, INCLUDING (BUT NOT LIMITED TO) ANY IMPLIED WARRANTIES OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS.

(f) Limitation of Liability. IN NO EVENT WILL DIRECTV OR ITS LICENSORS BE LIABLE TO YOU WITH RESPECT TO THE SOFTWARE FOR ANY DIRECT, INDIRECT, CONSEQUENTIAL, SPECIAL, PUNITIVE OR INCIDENTAL DAMAGE (INCLUDING LOSS OF PROFITS, LOST SAVINGS, LOSS OF DATA OR THE COST OF PROCUREMENT OF SUBSTITUTE GOODS, TECHNOLOGY OR SERVICES) ARISING OUT OF THE USE OR THE INABILITY TO USE THE SOFTWARE, EVEN IF DIRECTV OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR FOR ANY CLAIM BY A THIRD PARTY. Some states or jurisdictions do not allow the exclusion or limitation of incidental, consequential or special damages, so the above limitations may not apply to you.

(g) Additional Information. DIRECTV's licensors and suppliers shall be third party beneficiaries of these license terms, as applicable. Certain additional terms and information for the Software and certain third party software (including the text of licenses applicable to any free, open source and other similar software that may be included in the Software), may be found in the DIRECTV website located at www.directv.com, and the GNU website located at www.gnu.org.

(h) Third-Party Beneficiary. DIRECTV and you expressly acknowledge and agree that TiVo, Inc., a Delaware corporation with its principal place of business at 2160 Gold Street, Alviso, CA 95002, is an intended third-party beneficiary of this license agreement as it relates to TiVo software that may be contained in the Receiving Equipment. These license provisions are made expressly for the benefit of TiVo and are enforceable by TiVo in addition to DIRECTV.

8. **LIMITS ON OUR RESPONSIBILITY**

(a) Service Interruptions. Service may be interrupted from time to time for a variety of reasons. We are not responsible for any interruptions of Service that occur due to acts of God, power failure or any other cause beyond our reasonable control. However, because we value our customers, for an interruption of a significant length of time that is within our reasonable control, upon your request, we will provide what we reasonably determine to be a fair and equitable adjustment to your account to make up for such Service interruption. THIS WILL BE YOUR SOLE REMEDY AND OUR SOLE DUTY IN SUCH CASES.

(b) Warranty Disclaimer. EXCEPT AS PROVIDED HEREIN, WE MAKE NO WARRANTY REGARDING ANY SERVICE OR YOUR RECEIVING EQUIPMENT, WHICH IS PROVIDED AS IS. ALL SUCH WARRANTIES, INCLUDING, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY EXCLUDED. YOU BEAR THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE RECEIVING EQUIPMENT AND ARE RESPONSIBLE FOR THE ENTIRE COST OF ANY NECESSARY REPAIR.

(c) Limitations of Liability. WE ARE NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES OR LOSSES RELATING TO THE RECEIVING EQUIPMENT OR ANY SERVICE, WHETHER BASED ON NEGLIGENCE OR OTHERWISE, REGARDLESS OF THE CAUSE. OUR TOTAL LIABILITY FOR DAMAGES OR LOSSES TO YOU AND ANY OTHER PERSONS RECEIVING OUR SERVICE WILL IN NO EVENT EXCEED THE AMOUNT THAT YOU HAVE PAID TO US FOR THE SERVICE THAT YOU RECEIVED DURING THE SIX (6) MONTH PERIOD IMMEDIATELY PRIOR TO THE SPECIFIC EVENT THAT GAVE RISE TO THE APPLICABLE DAMAGE OR LOSS. THIS ALLOCATION OF RISK IS REFLECTED IN OUR PRICES. You may have greater rights than described above under your state's laws. You should consult them.

(d) Warranty Services. You agree that this Agreement does not provide for, and the Service does not include, any warranty services or other services that we might provide separately, including, without limitation, any fee based or other programs.

9. **RESOLVING DISPUTES**

In order to expedite and control the cost of disputes, you and we agree that any legal or equitable claim relating to this Agreement, any addendum, or your Service (referred to as a "Claim") will be resolved as follows:

(a) Informal Resolution. We will first try to resolve any Claim informally. Accordingly, neither of us may start a formal proceeding (except for Claims described in Section 9(b) below) for at least 60 days after one of us notifies the other of a Claim in writing. You will send your notice to the address on the first page of this Agreement, and we will send our notice to your billing address.

(b) Formal Resolution. Except as provided in Section 9(d), if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated (referred to as the "JAMS Rules") and under the rules set forth in this Agreement. If there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern. ARBITRATION MEANS THAT YOU WAIVE YOUR RIGHT TO A JURY TRIAL. You may, in arbitration, seek any and all remedies otherwise available to you pursuant to your state's law. If you decide to initiate arbitration, you agree to tell us in writing the amount that you would pay to file a lawsuit against us in the appropriate court of law in your state. Unless we agree to pay your fee for you, you only need to pay an arbitration initiation fee equal to such court filing fee, not to exceed $125, we agree to pay any additional fee or deposit required by JAMS to initiate your arbitration. We also agree to pay the costs of the arbitrator's proceeding. Other fees, such as attorney's fees and expenses of travel to the arbitration, will be paid in accordance with JAMS Rules. We waive any rights we may have under the Rules to seek attorneys fees and costs from you if we prevail in the arbitration. The arbitration will be held at a location in your hometown area unless you and we both agree to another location or telephonic arbitration. To start an arbitration, you or we must do the following things:

(1) Write a Demand for Arbitration. The demand must include a description of the Claim and the amount of damages sought to be recovered. You can find a copy of a Demand for Arbitration at www.jamsadr.com.

(2) Send three copies of the Demand for Arbitration, plus the appropriate filing fee, to:

JAMS
500 North State College Blvd., Suite 600
Orange, CA 92868
1-800-352-6267

(3) Send one copy of the demand for arbitration to the other party.

(c) Special Rules. (1) In the arbitration proceeding, the arbitrator has no authority to make errors of law, and any award may be challenged if the arbitrator does so. Otherwise, the arbitrator's decision is final and binding on all parties and may be enforced in any federal or state court that has jurisdiction. (2) Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

(d) Exceptions. Notwithstanding the foregoing: (i) any Claim listed on Section 10(b) above; and (ii) any dispute involving a violation of the Communications Act of 1934, 47 U.S.C. § 605, the Digital Millennium Copyright Act, 17 U.S.C. § 1201, the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 or any other statement or law governing theft of service, may be decided only by a court of competent jurisdiction. You may also assert an individual action in small claims court in lieu of arbitration.

10. MISCELLANEOUS

(a) Notice. Notices to you will be deemed given when personally delivered, addressed to you at your last known address and deposited in the U.S. Mail (which may include inclusion in your billing statement), or sent via Internet to the e-mail address you provided us or sent via satellite to your receiver or delivered when a voice message is left at the telephone number on your account. Your notices to us will be deemed given when we receive them at the address or telephone number on the first page of this Agreement.

(b) Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification as required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.

(c) Assignment of Account. We may assign your account or this Agreement and all rights and/or obligations hereunder to any third party without notice for any purpose, including, without limitation, collection of unpaid amounts, or in the event of an acquisition, corporate reorganization, merger or sale of substantially all of the party's assets to another entity. You hereby consent to such assignment. You must continue making all required payments to us in accordance with your billing statement, unless notified otherwise.

(d) Other. This Agreement and any device, activation, programming, or other service commitment Agreement that you entered into in connection with obtaining Receiving Equipment constitute our entire agreement. No salesperson or other representative is authorized to change it. If any provision is declared by a competent authority to be invalid that provision will be deleted or rectified to the extent necessary, and the rest of the Agreement will remain enforceable. The terms of this Agreement that expressly or by their nature survive termination shall continue thereafter until fully performed.

THANK YOU.

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LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST

AMY IMBURGIA and KATHY GREINER,
individually and on behalf of all others similarly situated,

Plaintiff,

vs.

DIRECTV, Inc., a California Corporation; and DOES 1-100, inclusive,

Defendants.

Case No. BC398295
CLASS ACTION

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR STAY PROCEEDINGS PENDING ARBITRATION AND TO COMPEL ARBITRATION

Date:	August 31, 2011
Time:	10:00 a.m.
Dept.:	324
Trial Date:	None
Action Filed:	September 17, 2008

* * *

2. DTV's Express Waiver in Court

On January 20, 2009, DTV filed a Motion to Stay pending the MDL proceedings. In its moving papers, DTV stated the following:

> "The Customer Agreement between DIRECTV and its customers provides that the customer's home state laws will govern the relationship ... ***DIRECTV has not sought and will not seek to arbitrate disputes with California customers.*** (Stevens Decl., Ex. F *[Reply in Support of DTV's Motion to Stay Pending the Conclusion of Federal Proceedings*, p. 5, line 20 – p. 7, line 13].) [emphasis added]

On March 23, 2009, at the hearing on DTV's Motion to Stay, the following stipulation occurred on the record between Counsel for DTV, Robyn Bladow, and the Court:

"MS. BLADOW: There really isn't an issue with respect to the class action waiver in this matter or in the federal matter as it relates to the California class rep or putative class representatives.

THE COURT: How do I know that? How do I know that you're not going to go there and try to enforce the class action waiver?

MS. BLADOW: I'm representing to your Honor that ***we will absolutely not try to enforce the class action waiver in that case.*** We have moved to compel arbitration already in that matter of the non-California plaintiffs and did not move to compel arbitration of the California plaintiffs. ***We would not move to compel arbitration of the plaintiffs in these matters, as well.*** [emphasis added]"

(Stevens Decl., Ex. G [Transcripts dated 3/23/2009, p. 7])

"THE COURT: ***Everything is predicated upon your representation that you're not going there to try to get the class action waiver. So I'm taking your representation that that is not going to happen, because that would be depriving California residents of rights given to them by California courts*** [emphasis added]"

(Stevens Decl., Ex. G [Transcripts dated 3/23/2009, p. 21])

After the Court denied DTV's Motion to Stay pending the MDL proceedings, Plaintiffs Greiner and Imburgia filed a First Amended Complaint ("FAC") on March 16, 2009. (Stevens Decl. at ¶¶ 22, 24.) After a series of motions, including DTV's demurrer to the complaint and Motion for Preliminary

Injunction, DTV filed an Answer to the FAC on February 16, 2010, again without any reservation of rights or affirmative defenses as to arbitration. (Stevens Decl. at ¶ 25; Stevens Decl., Ex. H.)

* * *

No. 14-462

IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

BRIEF FOR PETITIONER

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May 29, 2015

QUESTION PRESENTED

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner DIRECTV, Inc. has been merged into DIRECTV, LLC, with DIRECTV, LLC as the surviving entity. Pursuant to Supreme Court Rule 29.6, DIRECTV, LLC makes the following disclosures concerning parent entities and publicly held corporations that own 10% or more of its stock:

DIRECTV Holdings, LLC is the direct parent company and 100% owner of DIRECTV, LLC;

The DIRECTV Group, Inc. is the direct parent company and 100% owner of DIRECTV Holdings, LLC;

Greenlady Corp. controls a 57% interest in The DIRECTV Group, Inc.;

DTV Entertainment, Inc. is the direct parent company and 100% owner of Greenlady Corp.; and

DIRECTV, a publicly traded company and the ultimate parent company of DIRECTV, LLC, is the direct parent company and 100% owner of DTV Entertainment, Inc., and controls a 43% interest in The DIRECTV Group, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT ii

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

A. Background 4

B. Proceedings Below 7

SUMMARY OF ARGUMENT 9

ARGUMENT 11

The California Court of Appeal Violated The FAA By Failing To Interpret And Enforce The Parties' Arbitration Agreement According To Its Terms. 11

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....14

American Express Co. v. Italian Colors Restaurant,
133 S. Ct. 2304 (2013) 13, 18

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 1, 2, 8, 19, 20

Bowers Hydraulic Dredging Co. v. United States,
211 U.S. 176 (1908).....17

Brown v. Ralphs Grocery Co.,
128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011).....8

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....13

C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,
532 U.S. 411 (2001).....22

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001).....14

Claflin v. Houseman,
93 U.S. 130 (1876) 19

Cohen v. DIRECTV, Inc.,
48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006).....7

CompuCredit Corp. v. Greenwood,
132 S. Ct. 665 (2012) 13

Deal v. United States,
508 U.S. 129 (1993).....17

Dean Witter Reynolds Inc. v. Byrd,
470 U.S. 213 (1985).....13

Discover Bank v. Superior Ct.,
113 P.3d 1100 (Cal. 2005).....7, 20

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996).....14

Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,
458 U.S. 141 (1982).....19, 20

Fisher v. Becker Paribas Inc.,
791 F.2d 691 (9th Cir. 1986) 8

Hauenstein v. Lynham,
100 U.S. 483 (1879).....19

Huffman v. Hilltop Cos.,
747 F.3d 391 (6th Cir. 2014) 23

Indiana ex rel. Anderson v. Brand,
303 U.S. 95 (1938) 14

Iskanian v. CLS Transp. Los Angeles, LLC,
327 P.3d 129 (Cal. 2014).....7

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 12, 14, 22

Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....23

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 12, 23

Mount Diablo Med. Ctr. v. Health Net of Cal., Inc.,
124 Cal. Rptr. 2d 607 (Cal. Ct. App. 2002) 20

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013)2, 9, 18, 20-21, 24

Mutual Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 20

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*) 14, 23

People v. Sischo,
144 P.2d 785 (Cal. 1943) (*per curiam*) 19

Preston v. Ferrer,
552 U.S. 346 (2008).....14

Rodriguez v. American Techs., Inc.,
39 Cal.Rptr.3d 437 (Cal. Ct. App. 2006) 15

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010).....12, 13, 17

Testa v. Katt,
330 U.S. 386 (1947).....24

Vaden v. Discover Bank,
556 U.S. 49 (2009) 23

Volt Info. Sciences, Inc. v.
Board of Trs. of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989).....12, 13, 15, 17, 22

Constitution and Statutes

U.S. Const. art. VI, cl. 2 .....3, 19

9 U.S.C. § 2 .....4, 11, 14

9 U.S.C. § 4 .....4, 11

28 U.S.C. § 1257(a).....3

Cal. Civ. Code § 1770(a)(19).....8

Cal. Civ. Code § 1780(a)(4).....8

Other Authorities

Corbin, Arthur L., et al.,
Corbin on Contracts (rev. ed. 2014) 19

Restatement (Second) of Contracts (1981) 19

INTRODUCTION

This case involves the interpretation of an arbitration agreement between petitioner DIRECTV, Inc. and respondents, representatives of a class of former DIRECTV customers. That agreement by its plain terms makes two points abundantly clear: (1) the parties wished to resolve their disputes through arbitration, as opposed to litigation, and (2) the parties did not wish to arbitrate on a classwide basis. The parties sought to reconcile these two objectives by specifying, in a proviso to their agreement to dispense with class arbitration, that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] shall be unenforceable." There is absolutely no mystery as to the intent and effect of that proviso: it underscores that the parties really meant what they said about precluding class arbitration, even to the point of renouncing arbitration altogether if they otherwise would be forced to arbitrate on a classwide basis.

The proviso, it turned out, reflected an abundance of caution. After the parties entered into their arbitration agreement, this Court held that state law cannot force parties to arbitrate on a classwide basis where, as here, they have not agreed to do so. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Any state law that conditions the enforceability of an arbitration agreement on the availability of classwide arbitration, this Court held, is preempted by the Federal Arbitration Act (FAA). As the Court explained, "[r]equiring the availability of classwide arbitration interferes with fundamental

attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Because class arbitration "is not arbitration as envisioned by the FAA [and] lacks its benefits," it "may not be required by state law." *Id.* at 1752-53.

Ironically, however, the California Court of Appeal seized upon the proviso to deny arbitration here. According to that court, the proviso reflects the parties' intent to rely on state law *preempted* by the FAA to defeat their arbitration agreement, even though the parties affirmatively specified that their agreement is *governed* by the FAA. That interpretation, as the Ninth Circuit has explained, is "nonsensical." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013). The California Court of Appeal transformed an agreement that *forbids* class arbitration into an agreement that *requires* class arbitration to be enforceable.

That decision cannot possibly be characterized as a faithful application of federal arbitration law. The whole point of the FAA is to counteract traditional judicial hostility to arbitration by requiring courts, as a matter of substantive federal law, to enforce arbitration agreements according to their terms, and to resolve any doubts in *favor* of arbitration. The court below did precisely the opposite, refusing to enforce this arbitration agreement according to its terms, and instead endorsing an outlandish interpretation that *defeats* arbitration. This case thus shows that the judicial hostility to arbitration that motivated the FAA is far from a relic of the past. Accordingly, this Court should reverse the judgment.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 170 Cal. Rptr. 3d 190, and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 2-16a. The unreported order of the California Supreme Court denying review of the Court of Appeal's decision is reprinted at Pet. App. 1a. The trial court's unreported opinion denying petitioner's motion to compel arbitration is reprinted at Pet. App. 17-20a.

JURISDICTION

The California Court of Appeal issued its decision on April 7, 2014. Pet. App. 2a. Petitioner filed a timely petition for discretionary review, which the California Supreme Court denied on July 23, 2014. Pet. App. 1a. Petitioner filed a timely petition for certiorari on October 21, 2014, which this Court granted on March 23, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the U.S. Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 2 of the FAA provides in relevant part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any ... court ... for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration ... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

STATEMENT OF THE CASE

A. Background

The provision and acceptance of DIRECTV programming services—like many other consumer services (*e.g.*, banking, cellular, internet)—are subject to certain basic terms and conditions. Those terms and conditions are set forth in the DIRECTV

Customer Agreement. That Agreement is subject to revision by DIRECTV from time to time. When the Agreement is revised, it is sent to existing customers, who may either refuse it by canceling their DIRECTV service, or accept it by continuing to receive such service subject to the revised Agreement. *See* 2001 Customer Agreement § 4, JA115; 2004 Customer Agreement § 4, JA119; 2006 Customer Agreement § 4, JA123; 2007 Customer Agreement § 4, JA127; McCarthy Decl. ¶¶ 4-5, 12-15, 17-18, JA107-08, 110-13.

The Customer Agreement at issue here includes a dispute-resolution provision—Section 9—that broadly requires arbitration of "any legal or equitable claim relating to this Agreement, any addendum, or your Service (referred to as a 'Claim')." 2007 Customer Agreement § 9, JA128.

The arbitration provision specifies in relevant part:

> [I]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated ... and under the Rules set forth in this Agreement.

Id. § 9(b), JA128. The Agreement then proceeds to enumerate "Special Rules" governing arbitration, including the following:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or

> arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable.

Id. § 9(c), JA128-29. The latter "non-severability" provision represents a specific exception to the Customer Agreement's general severability provision, which specifies that "[i]f any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable." *Id.* § 10(d), JA129.

In addition, the Customer Agreement contains a choice-of-law provision stating as follows:

> Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. *Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.*

Id. § 10(b), JA129 (emphasis added).

B. Proceedings Below

In September 2008, respondents Amy Imburgia and Kathy Greiner filed separate putative class actions against DIRECTV, which were later consolidated, in the Superior Court for Los Angeles County. Pet. App. 3a. Both Imburgia and Greiner had cancelled their DIRECTV accounts in 2008, when they were subject to the 2007 Customer Agreement described above. *See* McCarthy Decl. ¶¶ 12-15, 17-18, JA110-13. The consolidated complaint alleged that DIRECTV had violated a variety of California laws by assessing early cancellation fees when respondents cancelled their DIRECTV accounts before the end of an agreed-upon time period. *See* First Am. Class Action Compl. ¶¶ 63-108, JA78-95.

Although the parties had agreed to arbitrate disputes like this one, DIRECTV did not move to compel arbitration when the complaints were filed. That is because, in 2005, the California Supreme Court had announced a rule that invalidated as unconscionable almost all consumer arbitration agreements containing class-action waivers. *See Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1106-10 (Cal. 2005). Applying that rule, California courts had specifically refused to enforce the arbitration provision in the DIRECTV Customer Agreement. *See, e.g., Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006). Accordingly, any attempt to compel arbitration when the complaints in this case were filed would have been futile under then-prevailing California law, *see, e.g., Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 143-45 (Cal. 2014); *Fisher v. Becker Paribas Inc.*, 791 F.2d

691, 697 (9th Cir. 1986)—and, indeed, could have subjected DIRECTV to punitive damages for seeking to enforce an unconscionable contract, *see* Cal. Civ. Code §§ 1770(a)(19), 1780(a)(4). The case therefore proceeded in court until, on April 27, 2011, this Court held in *Concepcion* that the FAA preempts state laws that purport to require class arbitration where the parties have not agreed to it. *See* 131 S. Ct. at 1747-53.

In light of *Concepcion*, DIRECTV promptly moved to compel arbitration. The trial court (Wiley, J.), however, denied the motion on the ground that the parties' arbitration agreement is unenforceable under *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), a case involving labor-related representative actions under California's Private Attorney General Act of 2004 (which is not at issue in this case). Pet. App. 17-20a.

DIRECTV appealed, but the Court of Appeal affirmed the trial court's decision on different grounds. *See* Pet. App. 2-16a. In particular, the appellate court focused on the proviso to the parties' agreement to dispense with class arbitration, which states that "if 'the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.'" Pet. App. 6a (quoting Customer Agreement § 9(c)). According to the court, the reference to "the law of your state" in that proviso means state law immune from the ordinary preemptive force of federal law. Pet. App. 6-15a. Thus, the court concluded, the proviso nullifies the arbitration agreement, because the parties agreed to be bound by state law preempted by the FAA—even

though the parties specified that their arbitration agreement was governed by the FAA. Pet. App. 15a.

The Court of Appeal acknowledged that its decision conflicted with the Ninth Circuit's decision in *Murphy*, which had characterized the reasoning embraced by the Court of Appeal as "nonsensical." *Murphy*, 724 F.3d at 1226. The Court of Appeal, in turn, dismissed the Ninth Circuit's analysis as "unpersuasive." Pet. App. 13a. According to the Court of Appeal, "*Murphy* provides no basis for concluding that the parties intended to use the phrase 'the law of your state'" to mean state law subject to the ordinary preemptive force of federal law. *Id.* Instead, the Court of Appeal interpreted the phrase "the law of your state" to mean "'the (nonfederal) law of your state *without considering the preemptive effect, if any, of the FAA*.'" Pet. App. 14a (emphasis added). Applying preempted California law, the Court held the class-action waiver invalid, and thus refused to enforce the arbitration agreement. Pet. App. 15a.

DIRECTV timely petitioned for review in the California Supreme Court to resolve the conflict between the California Court of Appeal and the Ninth Circuit. On July 23, 2014, however, the California Supreme Court denied review over Justice Baxter's dissent. Pet. App. 1a. This Court subsequently granted certiorari.

SUMMARY OF ARGUMENT

The FAA requires state and federal courts alike to interpret and enforce arbitration agreements according to their terms, and to resolve any doubts in favor of arbitration. The California Court of Appeal here, however, did precisely the opposite: the court

refused to enforce arbitration by embracing a nonsensical interpretation of the parties' agreement. That agreement reflects an unmistakable intent to arbitrate disputes *unless* state law would force the parties into class arbitration. The FAA, however, preempts state law that would force the parties into class arbitration. Accordingly, the state court should have enforced the parties' arbitration agreement.

Instead, the court interpreted the reference to state law in the parties' arbitration agreement to mean state law immune from the ordinary preemptive effect of federal law. In context, however, that interpretation makes no sense: once state law that might force the parties into class arbitration is preempted, it necessarily poses no risk of forcing them into class arbitration, and hence provides no basis for nullifying their manifest intent to arbitrate their disputes. That point is all the more compelling in light of the contractual provision specifying that the arbitration agreement here is governed by the FAA: the parties hardly would have specified that their arbitration agreement is governed by the FAA if they intended to bind themselves by reference to state law inconsistent with, and thus preempted by, the FAA. In any event, in our federal system, there is no such thing as state law immune from the ordinary preemptive force of federal law; preempted state law is a legal nullity. There is absolutely nothing in the arbitration clause at issue here to indicate that the parties chose to forego their arbitration rights by reference to *hypothetical* state law immune from federal preemption as opposed to *actual* state law subject to federal preemption.

And even if there were any ambiguity on any of the foregoing—which there is not—the court below would have been constrained to compel arbitration. The FAA, as this Court has long held, requires courts to resolve any ambiguities in *favor* of, not *against*, arbitration.

At bottom, the decision below cannot possibly be characterized as a faithful application of the FAA and this Court's arbitration precedents. Rather, that decision distorts the parties' agreement to thwart their federal arbitration rights. Accordingly, this Court should reverse the judgment.

ARGUMENT

The California Court of Appeal Violated The FAA By Failing To Interpret And Enforce The Parties' Arbitration Agreement According To Its Terms.

The California Court of Appeal erred by refusing to interpret and enforce the parties' arbitration agreement according to its terms. Whatever the merits of the state court's decision as a matter of *state* law, the court violated *federal* law by denying arbitration here.

By its terms, the FAA provides that a written arbitration provision in a transaction involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also id.* § 4 (specifying that courts must direct parties to proceed to arbitration "in accordance with the terms of the agreement"). These provisions were enacted to overcome the "ancient judicial hostility to arbitration," *Mastrobuono v.*

Shearson Lehman Hutton, Inc., 514 U.S. 52, 56 (1995) (internal quotations omitted), by "ensur[ing] that 'private agreements to arbitrate are enforced according to their terms,'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).

To that end, the FAA "create[s] a body of *federal substantive law of arbitrability*, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). In the absence of such substantive federal law, after all, courts could thwart federal arbitration law at will by simply refusing to enforce arbitration agreements under state law. Thus, substantive federal arbitration law "establish[es] that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 475-76 (internal citation omitted); *see also Stolt-Nielsen*, 559 U.S. at 682 (substantive federal arbitration law applies "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause"); *Moses H. Cone*, 460 U.S. at 25 (substantive federal arbitration law applies "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability").

As a result, the interpretation and enforcement of an arbitration agreement governed by the FAA is a *hybrid* of state and federal law. "While the interpretation of an arbitration agreement is generally a matter of state law," *Stolt-Nielsen*, 559 U.S. at 681, the FAA ensures that, as a matter of federal law, the agreement is interpreted and enforced in a manner consistent with federal arbitration law—especially the cardinal federal rule that courts must "'give effect to the contractual rights and expectations of the parties,'" *id.* at 682 (quoting *Volt*, 489 U.S. at 479); *see also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) ("[C]onsistent with th[e] text [of the FAA], courts must 'rigorously enforce' arbitration agreements according to their terms.") (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms.").

That is why the interpretation and enforcement of an arbitration agreement subject to the FAA presents a question of substantive federal law subject to this Court's review. Thus, in *Stolt-Nielsen*, this Court held as a matter of *federal* law that contractual silence with respect to classwide arbitration cannot be interpreted as consent to classwide arbitration, regardless of contrary state law. *See* 559 U.S. at 684-87. Similarly, in *Buckeye Check Cashing, Inc. v. Cardegna*, this Court held as a matter of *federal* law that an arbitration clause is severable from the rest of the contract, regardless of contrary state law. 546 U.S. 440, 445-49 (2006). Needless to say, these decisions and countless others

would be inexplicable if federal law had no role to play in the interpretation and enforcement of arbitration agreements governed by the FAA. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-73 (1995). Substantive federal arbitration law serves as an important check on the application of state law, safeguarding the parties' federal arbitration rights. *See, e.g.*, *Mastrobuono*, 514 U.S. at 56-64 (reversing lower court's interpretation of arbitration agreement); *cf. Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). Indeed, the suggestion that, "despite this Court's jurisprudence," the interpretation and enforcement of arbitration agreements governed by the FAA "is purely a matter of state law" provides "all the *more* reason for this Court to assert jurisdiction" to ensure faithful application of that federal statute. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*) (emphasis added).

There can be no dispute that the parties here entered into a written arbitration agreement, or that the interpretation and enforcement of that agreement is governed by FAA. As an initial matter, the parties' Customer Agreement is "a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, which this Court has interpreted to signal "Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce*, 513 U.S. at 273; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001). In any event, to dispel any conceivable doubt on this score, the parties here specified that their arbitration agreement "shall be governed by the Federal Arbitration Act," 2007 Customer Agreement

§ 10(b), JA129. Thus, the FAA governs the interpretation and enforcement of the arbitration agreement in this case not only of its own force, but also as a matter of private contract. Parties to arbitration agreements (like any other contracts), after all, are free to choose the law that will govern the interpretation and enforcement of their agreements. *See, e.g.*, *Volt*, 489 U.S. at 476-79 (respecting parties' choice of state procedural law to govern the enforcement of their arbitration agreement); *Rodriguez v. American Techs., Inc.*, 39 Cal.Rptr.3d 437, 445 (Cal. Ct. App. 2006) (respecting parties' choice of federal procedural law to govern the enforcement of their arbitration agreement).

Accordingly, this case squarely presents the substantive federal question whether the California Court of Appeal violated the FAA by failing to interpret and enforce the parties' arbitration agreement according to its terms. The answer to that question is clearly "yes." Indeed, this case is about as easy as they come.

The parties here agreed that "any legal or equitable claim relating to this Agreement, any addendum, or your Service," if not resolved informally, would be "resolved *only* by binding arbitration." 2007 Customer Agreement § 9, JA128 (emphasis added). There is no dispute that respondents' challenge to DIRECTV's early-cancellation policy is a "legal or equitable claim relating to this Agreement, any addendum, or your Service." *Id.*

The parties' arbitration agreement, however, did not stop with identifying the claims subject to arbitration. Rather, it proceeded to set forth rules

governing the arbitration process. Thus, it specified that "[t]he arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated ... and under the rules set forth in this Agreement." *Id.* § 9(b), JA128. And "[i]f there is a conflict between JAMS Rules and the rules set forth in this Agreement, the rules set forth in this Agreement will govern." *Id.*

Of particular relevance here, in a section of the agreement entitled "Special Rules," the parties agreed that neither side "shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity." *Id.* § 9(c), JA128-29. In light of that agreement, the parties further specified that "the JAMS Class Action Procedures do not apply to our arbitration." *Id.*, JA129. And, to foreclose any possibility of being forced into class arbitration, the parties included a proviso to their agreement to dispense with class arbitration: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [*i.e.*, the arbitration provision] is unenforceable." *Id.*

The California Court of Appeal seized on that proviso to justify denial of DIRECTV's request to enforce arbitration. According to the state court, the phrase "the law of your state" is subject to two different interpretations: it could mean either "[1] 'the law of your state to the extent it is not preempted by the FAA,' or [2] 'the law of your state without considering the preemptive effect, if any, of the FAA.'" Pet. App. 8a. Purporting to apply state-

law rules of contract interpretation, the court chose the latter interpretation, and accordingly applied preempted state law to refuse to enforce the parties' arbitration agreement. *See* Pet. App. 8-11a.

That interpretation cannot stand as a matter of substantive federal law, as it manifestly fails to enforce the parties' arbitration agreement "'according to [its] terms.'" *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt*, 489 U.S. at 479). Indeed, the California Court of Appeal turned the parties' arbitration agreement upside down by applying state law preempted by the FAA to refuse to enforce an arbitration agreement governed by the FAA.

For starters, the question here is not, as the state appellate court approached it, the meaning of the phrase "the law of your state" in the abstract. Rather, the question here is the meaning of that phrase in the context of an arbitration agreement governed by the FAA where the parties manifested an unmistakable intent to arbitrate their disputes unless they would be forced into class arbitration. *See* 2007 Customer Agreement § 9, JA128-29. It is a "fundamental principle of ... construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also Bowers Hydraulic Dredging Co. v. United States*, 211 U.S. 176, 188 (1908) ("To separate the words [of a phrase] from all the other provisions of the contract in order to give them an assumed or proven abstract ... meaning, repugnant to their significance in the contract, would be to destroy, and not to sustain and enforce, the contract requirements."); *see generally* 5

Arthur L. Corbin *et al.*, *Corbin on Contracts* § 24.21 (rev. ed. 2014); *Restatement (Second) of Contracts* § 202(2) (1981).

The California Court of Appeal wholly ignored the fact that it was construing the phrase "the law of your state" in the context of an arbitration agreement governed by the FAA where the parties manifested an unmistakable intent to arbitrate their disputes unless they would be forced into class arbitration. *See* 2007 Customer Agreement § 9, JA128-29. In this context, there is no reason to suppose that the parties intended to nullify their arbitration agreement where, as here, they would *not* be forced into classwide arbitration.

Indeed, it is fanciful to suppose that the parties would have specified that, "[n]otwithstanding" the general choice-of-law provision in the Customer Agreement, their arbitration agreement "shall be governed by the [FAA]," *id.* § 10(b), JA129, if they intended for the enforcement of that agreement to be foreclosed by state law *preempted* by the FAA. Given the parties' expectation that the FAA would govern their arbitration agreement, "it would be remarkable for a court to erase that expectation" by resurrecting state law inconsistent with, and thus preempted by, the FAA. *American Express*, 133 S. Ct. at 2309.

Far from embracing state law preempted by the FAA, thus, the parties here "did exactly the opposite" by agreeing that their arbitration argument "shall be governed by" the FAA. *Murphy*, 724 F.3d at 1228. They sought to *prevent* the application of state law inconsistent with the FAA, "not ... to *rely* on state law that 'creates a scheme inconsistent with the FAA.'" *Id.* at 1226 (emphasis added; quoting

Concepcion, 131 S. Ct. at 1748). In this context, the California Court of Appeal's conclusion "that the parties intended for state law to govern the enforceability of DirecTV's arbitration clause, even if the state law in question contravened [the FAA], is nonsensical." *Id.*

Indeed, wholly apart from context, the state court's interpretation of the phrase "the law of your state" to refer to state law immune from the ordinary preemptive force of federal law is plainly unreasonable. Under the Supremacy Clause of the Federal Constitution, U.S. Const. art. VI, cl. 2, state law is *always* subject to the preemptive force of federal law. Thus, it is "a fundamental principle in our system of complex national polity" that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879); *see also Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 157 n.12 (1982) ("[T]he 'law of the jurisdiction' includes federal as well as state law."); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876) ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are."); *People v. Sischo*, 144 P.2d 785, 791-92 (Cal. 1943) (*per curiam*) ("The Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land to the same extent as though expressly written into every state law.") (internal citation omitted).

There is no such thing, in other words, as state law immune from the ordinary preemptive effect of

federal law. Rather, "it has long been settled that state laws that conflict with federal law are *without effect*." *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (emphasis added; internal quotation omitted); *see also De la Cuesta*, 458 U.S. at 153 (state law preempted by federal law is "nullified"). The preempted state law does not lurk in the shadows, only to emerge when unsuspecting parties invoke state law in their private dealings. State law preempted by federal law does not exist any more than state law that has been repealed; it is not "law" in any sense of the word. *See, e.g.*, *Murphy*, 724 F.3d at 1226 (in light of *Concepcion*, "the *Discover Bank* rule is not, and indeed never was, California law.").

Contracting parties can always choose, of course, to bind themselves by reference to state law that has been "nullified" by federal law, just as they can choose to bind themselves by reference to the rules of a board game. But it is entirely unrealistic to suppose that they would undertake so idiosyncratic an obligation absent some affirmative indication to that effect. *See, e.g.*, *Mount Diablo Med. Ctr. v. Health Net of Cal., Inc.*, 124 Cal. Rptr. 2d 607, 616 (Cal. Ct. App. 2002) (contract should not be construed to refer to preempted state law, "at least in the absence of unambiguous language in the contract making the intention to do so unmistakably clear"). A mere reference to "the law of your state," absent any evidence that the parties agreed to ignore the ordinary rules of preemption, cannot do the trick. In *any* context, but particularly in *this* context, the intent of the parties in referring to "the law of your state" is quite obviously to refer to the "the law of your state" in force at any given time, not

hypothetical state law immune from the ordinary preemptive force of federal law, or for that matter state law that has been repealed.

The California Court of Appeal proved nothing by invoking the maxim that "when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." Pet. App. 8-9a (internal quotation omitted). That maxim is perfectly fine as a general tool of interpretation, but has absolutely no bearing here, where there is no inconsistency between a general and a specific provision. The court below purported to discern an inconsistency between the arbitration agreement's specific reference to "the law of your state" and "the arbitration agreement's general adoption of the FAA." Pet. App. 9a (emphasis omitted). "That is, although the agreement provides that in general section 9 is governed by the FAA, section 9 itself provides that the specific issue of the enforceability of the class action waiver shall be governed by 'the law of your state.'" *Id.*

But that approach begs the question, as there is no inconsistency between the reference to "the law of your state" and the choice-of-law provision adopting the FAA *unless* the reference to "the law of your state" is construed to mean "the law of your state" immune from the ordinary preemptive effect of federal law. Thus, the maxim in no way advances the ball in resolving the interpretive issue presented here. *See Murphy*, 724 F.3d at 1228 ("[T]here is no conflict between the reference to 'the law of your state' in Section 9 of the Customer Agreement and the reference to the FAA in Section 10."). The

maxim, after all, is a tool for *resolving* contractual inconsistency, and certainly does not require courts to *create* inconsistency where none would otherwise exist. Indeed, interpreting "the law of your state" to refer to state law subject to the ordinary preemptive force of federal law (including the FAA) *harmonizes* the two provisions, as opposed to driving them into conflict. *Cf. Mastrobuono*, 514 U.S. at 63-64 (applying the "cardinal principle of contract construction" that provisions should be "harmonize[d]," not set up "in conflict").

Equally unavailing is the California Court of Appeal's invocation of "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." Pet. App. 10a (internal quotation omitted). That rule is a tool for *resolving* contractual ambiguity, not for *creating* it. As noted above, in the context of this arbitration agreement, there is absolutely nothing ambiguous about the meaning of the phrase "the law of your state." Thus, the rule that ambiguous contractual provisions must be construed against the drafter has no bearing here. *See, e.g., C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423 (2001).

But even if the California Court of Appeal were correct that the arbitration agreement here is ambiguous, the court would have been constrained to compel arbitration. As a matter of substantive federal arbitration law, "'ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.'" *Mastrobuono*, 514 U.S. at 62 (quoting *Volt*, 489 U.S. at 476); *see also Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."); *Moses H. Cone*, 460 U.S. at 24-25 ("The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Thus, "where ambiguity in agreements involving arbitration exists, ... the strong presumption in favor of arbitration applies instead." *Huffman v. Hilltop Cos.*, 747 F.3d 391, 396-97 (6th Cir. 2014). In purporting to resolve the alleged "ambiguity" against arbitration, however, the state court below failed even to *mention*—much less *apply*—the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi*, 473 U.S. at 631.

* * *

This case vividly illustrates why Congress enacted the FAA. The California Court of Appeal went out of its way to thwart, not enforce, the parties' written arbitration agreement, which is precisely what the FAA forbids. At bottom, thus, this case is about the supremacy of federal law. Precisely because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration[,] ... [i]t is a matter of great importance ... that state ... courts adhere to" their obligations under that federal statute. *Nitro-Lift*, 133 S. Ct. at 501; *see also Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) ("State courts ... have a prominent role to play as enforcers of agreements to arbitrate."). State courts may not always like federal law, but they are

duty-bound to enforce it. *See, e.g.*, *Testa v. Katt*, 330 U.S. 386, 389-94 (1947). The state court below manifestly breached that duty by embracing a "nonsensical" interpretation of the parties' arbitration agreement to thwart their federal arbitration rights. *Murphy*, 724 F.3d at 1226. This Court—which alone can vindicate the supremacy of federal law in state court—should neither encourage nor tolerate such manifest defiance.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

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No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BRIEF FOR THE RESPONDENTS 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 11

I. This Court's Precedents Establish That State Law Governs The Construction Of An Arbitration Clause, Which May Freely Incorporate State Arbitration Procedures. 11

II. The California Court Of Appeal Was Correct To Interpret The Contract According To California Contract Law. 17

A. Under The Act, The Court Of Appeal Correctly Looked To State Law To Construe The Contract. 17

B. DIRECTV's Argument In Any Event Fails Because The Act Does Not Preempt The Parties' Choice To Incorporate California's Ban On Class action Waivers Into Their Agreement 24

III. There Is No Merit To DIRECTV's Irrelevant Criticisms Of The Court Of Appeal's Reading Of The Contract 28

IV. The Court May Conclude That The Better Course Is To Dismiss The Writ Of Certiorari As Improvidently Granted 39

CONCLUSION 46

TABLE OF AUTHORITIES

Page(s)

Cases

Allied–Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 28

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011)..... *passim*

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 28

C&L Enters. v. Citizen Band Potawatomi Indian Tribe,
532 U.S. 411 (2011) 35

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 28

E.E.O.C. v. Waffle House, Inc.,
534 U.S. 279 (2002) 28

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 30

Fidelity Fed. Sav. & Loan v. De la Cuesta,
458 U.S. 141 (1982) 35

First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 14, 15, 20, 42

Granite Rock Co. v. Int'l Bhd. of Teamsters,
561 U.S. 287 (2010) 20, 21, 42

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 28

Page(s)

Cases (continued)

Mastro Plastics Corp. v. Nat'l Labor Relations Bd.,
350 U.S. 270 (1956) 20

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 5, 26, 27, 30, 42

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 20

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 29, 30, 44

Oxford Health Plans LLC v. Sutter,
133 S. Ct. 2064 (2013)..... 8, 16, 17, 25, 26

Preston v. Ferrer,
552 U.S. 346 (2008) 28

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 14, 21

Prouty v. Gores Technology Group,
121 Cal. App. 4th 1225 (2004)..... 5

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 16, 26, 29, 30, 44

Trans World Airlines, Inc. v. Franklin Mint Corp.,
466 U.S. 243 (1984) 32

Valencia v. Smyth,
185 Cal.App.4th 153 (2010)..... 35

Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. University,
489 U.S. 468 (1989) ..... *passim*

Statutes

U.S. Const., art. VI, cl. 2 ..... 9, 34, 38
9 U.S.C. §§1-16 ..... *passim*
9 U.S.C. § 2 42
9 U.S.C. § 4 18
28 U.S.C. § 1257(a) 46
28 U.S.C.A. § 1652 30
California Civil Code § 1641 20
California Civil Code § 1670.5(a) 34
California Civil Code § 1750 *et seq.* 37, 38
California Civil Code § 1751 3
California Civil Code § 1781(a) 3

Rules

Supreme Court Rule 14(g)(i) 45
Supreme Court Rule 24(e) 45

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Alcoa Inc.'s Sales Agreement
https://www.alcoa.com/primary_na/en/pdf/AMM_Sales_Terms_and_Conditions.pdf
(last accessed July 17, 2015) 38

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http://www.gmaconline.com/docs/AllyArbitrationAgreement.pdf
(last accessed July 17, 2015) 36

Other Authorities (continued)

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https://www.bankofamerica.com/deposits/resources/deposit-agreements.go
(last accessed July 14, 2015) 38,39

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https://retailservices.wellsfargo.com/pdf/ccra/dillards-credit-card.pdf
(last accessed July 17, 2015) 36

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http://www.directv.com/learn/pdf/residential_customer_agreement.pdf
(last accessed July 17, 2015) 36

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http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/creditcardagreement_5181.pdf
(last accessed July 17, 2015) 37

Microsoft's Customer Agreement
http://windows.microsoft.com/en-us/windows/microsoft-services-agreement
(last accessed July 17, 2015) 37

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http://www.pulte.com/assets/pdf/PulteProtectionPlan.pdf
(last accessed July 14, 2015) 39

The Western Union Company's agreement
https://www.westernunion.com/us/en/terms-conditions.html
(last accessed July 17, 2015) 37

Other Authorities (continued)

Whirlpool Corporation's Extended Service Plan Agreement
https://www.whirlpoolextendedserviceplans.com/Home/TermsConditions_USA
(last accessed July 17, 2015) 37

Windstream Holdings, Inc.'s Terms and Conditions
http://www.windstream.com/Terms-and-Conditions/
(last accessed July 14, 2015) 39

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

Petitioner's opening brief identifies the opinions below.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Appendix to this brief reproduces the relevant provisions of the Federal Arbitration Act and the California Consumer Legal Remedies Act.

STATEMENT OF THE CASE

The contract between petitioner DIRECTV and its respondent customers provides that its arbitration provision is "unenforceable" if "the law of your state" would forbid the contract's prohibition on class action procedures. The California Court of Appeal held that the contract is subject to the Federal Arbitration Act (hereinafter, "the Act"), which freely permits parties to shape their own arbitration agreements, including by subjecting them to state arbitration law. Applying California law, the court concluded that "state" law refers to a California statute that bars class action waivers in cases under the California Consumer Legal Remedies Act, not to the preemptive effect of federal law.

1. Petitioner DIRECTV and its California customers (respondents here) entered into a Customer Agreement (hereinafter "the Contract"). *See* JA 122-25 (2007 version, operative at the time the dispute arose). The Contract is a form agreement, applicable

to all of DIRECTV's customers around the nation. DIRECTV claims the authority to unilaterally modify the Contract. JA 127 § 4. A customer who cancels the agreement in response to such a change will be subject to applicable early termination fees. *Id.*

Section 10(b) of the Contract includes a choice-of-law provision identifying the "applicable law." JA 129 (capitalization omitted). It states: "The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you." *Id.* Because respondents received services in California, the applicable "law of the state" is California law. *Id.*

Section 9 of the Contract addresses "resolving disputes," and when enforceable generally provides for the parties to attempt to resolve their disputes informally and, if that fails, to arbitrate. JA 128-29 (capitalization omitted). As provided in Section 10(b), "Section 9 shall be governed by the Federal Arbitration Act."

Section 9(c) sets forth certain "special rules." *Id.* Particularly relevant here is what we refer to as "the class action waiver": "Neither you [the customer] nor we [DIRECTV] shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative of a class or in a private attorney general capacity." *Id.* There is, however, a major exception that we refer to as "the anti-severability clause":

> If, however, the law of your state would find this agreement to dispense with class

> arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

Id. 129.

The latter clause's name reflects that it is an express departure from the Contract's general rule that if a provision of the Contract is "declared . to be invalid," that provision alone will be severed. *See Id.* § 10(d) ("If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of this Agreement will remain enforceable.").

Respondents Amy Imburgia and Kathy Greiner were DIRECTV customers as of the effective date of the 2007 Customer Agreement. Both terminated their DIRECTV accounts. In response, DIRECTV assessed them early-termination fees. Respondents then brought this action under, *inter alia*, the Consumers Legal Remedies Act ("CLRA"), Cal. Civil Code § 1750, *et seq.*, alleging that the fees were unlawful under California law.

At all relevant times – (1) when respondents terminated their DIRECTV services; (2) when DIRECTV imposed the fees giving rise to respondents' state law claims; and (3) when respondents initiated this action – it was settled in California that class action waivers with respect to claims under the CLRA were unenforceable. The statue so provides. *Id.* §§ 1751, 1781(a). A dispute under the Contract would therefore be litigated rather than arbitrated.

2. Respondents filed this suit (which consolidates two separate complaints) in 2008 as a putative class action in California Superior Court. In light of the anti-severability clause, DIRECTV represented to the court that it would not seek to arbitrate respondents'

claims. JA 52; JA 143-44. The Superior Court certified a class of DIRECTV's California customers who had been subject to early-termination fees. Pet. App. 3a-4a.

Nearly three years into the case, this Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that the Act preempts a California doctrine deeming certain class action waivers unconscionable. In response, DIRECTV moved under the Act to compel respondents to pursue their claims individually in arbitration. Pet. App. 4a. The Superior Court denied the motion. *Id.* 5a.

3. DIRECTV took an interlocutory appeal to the California Court of Appeal, which affirmed. The court agreed with respondents that

> the law of California would find the class action waiver unenforceable because, for example, the CLRA expressly precludes waiver of the right to bring a class action under the CLRA. [T]he parties' entire arbitration agreement is unenforceable, pursuant to the agreement's express terms, because the law of plaintiffs' state would find the class action waiver unenforceable.

Id. 6a.

In reaching that conclusion, the Court of Appeal recognized that the Contract was subject to the Act, from which the parties could not "opt out." *Id.* 7a. The court explained that under this Court's precedents its obligation was thus to enforce the agreement "in accordance with [its] terms." *Id.* (quoting *Volt Info. Sci. v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989)). Consistent with the Act's "policy of enforcement of arbitration agreements according to

their terms," parties are free to specify whether and how disputes will be arbitrated. *Id.* Thus, it was undisputed that nothing in the Act would preclude DIRECTV and respondents from expressly agreeing "that the enforceability of the class action waiver 'shall be determined under the law of your state without considering the preemptive effect, if any, of the FAA.'" *Id.* 8a.

Because the anti-severability clause did not specify whether it took account of preemption under the Act, the Court of Appeal undertook "to interpret section 9's choice of law concerning enforceability of the class action waiver." *Id.* DIRECTV argued that under the Act, *Concepcion* compelled a finding that the relevant state "law" was preempted. But applying California case law, the Court of Appeal concluded that the reference to "law of [the customer's] state" was inconsistent with – and thus an exception to – the more general provision that Section 9 is subject to the Act. Pet. App. 9a (citing *Prouty v. Gores Technology Group*, 121 Cal. App. 4th 1225, 1235 (2004)).

At the very least, the Court of Appeal reasoned, the Contract is ambiguous as to whether "law of your state" incorporates principles of preemption. It is a settled "common-law rule of contract interpretation" that ambiguity must be resolved against the party which drafted the agreement – DIRECTV *Id.* (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995)).

4. After the California Supreme Court denied review, this Court granted certiorari.

SUMMARY OF ARGUMENT

I. The California Court of Appeal correctly construed the Contract according to state law, without applying a presumption that the parties intended to negate the anti-severability clause and arbitrate their disputes.

A. Under the Federal Arbitration Act, the Court of Appeal was required to interpret the Contract "according to its terms." Two "terms" are essential here: Section 10's choice-of-law provision requires interpreting the agreement under California law; and Section 9's anti-severability clause specifically incorporates the "law of [the customer's] state" regarding class action waivers. The former provision guides the interpretation of the latter – *i.e.*, California law determines what constitutes the "law of the [customer's] state." The California Court of Appeal determined that the law incorporated by the agreement is the California Consumer Legal Remedies Act's prohibition on class action waivers, without regard to whether the Act would preempt the state from imposing such a prohibition as a matter of positive law. That ruling resolves the case, because this Court does not sit to review the state court's construction of state law.

There is no merit to DIRECTV's counter-argument that under the Act this Court must determine whether the state court's interpretation of the agreement was correct. By definition, that would negate the settled principle under the Act that state law determines the meaning of arbitration provisions in ordinary contracts like this one. DIRECTV's suggestion that only extreme misinterpretations of arbitration provisions need be corrected would still

require the federal courts to examine and overturn the Contract's established meaning under state law. Every such ruling would negate the parties' determination that state law governs their contract's construction.

Nothing in the Act adopts a broad "presumption" that parties intend to arbitrate disputes between them. Instead, this Court has recognized more narrowly that when the parties have entered into a broad agreement to arbitrate, that agreement will be presumed to encompass all disputes between them. That principle reflects the common-sense understanding that the parties will expressly exclude matters that they instead intend to litigate. Neither that presumption nor its rationale applies here. The present controversy relates to whether the parties in fact have broadly agreed to arbitrate. There is no reason to presume the parties intended the Contract's anti-severability clause to be ineffective. Imposing such a presumption to overturn the Contract's meaning under California law would contravene the bedrock principle that the Act requires only the arbitration of claims that the parties have themselves chosen to arbitrate.

B. In any event, DIRECTV's argument depends on the false premise that the Act preempts the Contract's express incorporation of California's prohibition on class action waivers. According to DIRECTV, the Act preempts a state from requiring the parties to litigate as a class. That is true, but irrelevant, because that is not what happens under the Contract. The core principle under the Act is that the parties' own agreements will be respected. Here, the parties incorporated that state law and decided to

abide by it. Nothing in the Act preempts their agreement that if California would prohibit a waiver of the customers' right to proceed as a class, they would litigate their disputes instead.

DIRECTV's argument that its position is compelled by *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), fails. In that case, the parties agreed to prohibit class action arbitration, but the state purported to require them to permit it. This case is instead like *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). There, the arbitrator construed the parties' contract to authorize class action procedures. This Court held that *Concepcion* was no obstacle to that agreement.

II. Although DIRECTV's criticisms of the Court of Appeal's construction of the Contract are irrelevant as a matter of law, they are also wrong. DIRECTV's principal assertion is that the parties obviously intended to arbitrate their disputes if possible, so long as the state did not or could not require them to authorize class action procedures. In fact, the parties obviously intended to litigate their disputes both under the operative agreement and when this dispute arose. At those times, there was no doubt that the anti-severability clause barred arbitration in California. There is no reason to believe the parties intended that, when the understanding of federal preemption changed almost three years into the case, they would dissolve the class, terminate the court proceedings, and start the whole process over in innumerable individual arbitrations.

There is every reason to believe respondents instead intended the Contract to function as the Court of Appeal understood. Consumers would naturally

want to leave open the prospect that they could pursue claims as a class. DIRECTV now asserts that it always sought to arbitrate, if possible. But that proves at most that the parties had inconsistent interpretations of the Contract. That disagreement is resolved against DIRECTV, which drafted the agreement.

DIRECTV is also wrong that the phrase "law of your state" is naturally understood to incorporate principles of federal preemption. The answer to the question whether "California law" prohibits class action waivers is naturally "yes," not (as DIRECTV would have it) "no." The contract, DIRECTV's brief, this Court's precedents, and the Constitution's Supremacy Clause *all* distinguish state law from federal law in exactly this respect.

By contrast, DIRECTV's position would read the anti-severability clause out of the agreement (because it would have no effect in any state) or at least treat the phrase "of your state" as surplusage (because all that would matter is the lawfulness of class action waivers under "law" generally). If DIRECTV were correct that the parties intended the anti-severability clause to turn on the question whether the class action waiver would be invalid in a court challenge, they would have said so expressly.

The pattern of other similar clauses is striking. DIRECTV itself – in several versions of the Contract both before and after the one at issue in this case – wrote the anti-severability clause to turn on whether a court would deem the class action waiver valid. So do the arbitration provisions of numerous other Fortune 500 companies. No other major company used

or uses the unusual "law of your state" formulation at issue here.

III. For several reasons, the Court may conclude that the best course is simply to dismiss the petition for certiorari as improvidently granted. DIRECTV's argument assumes without foundation that the Court of Appeal recognized that the Contract contains an arbitration agreement. In fact, the better view is that the lower court concluded the parties had not entered into an agreement to arbitrate their disputes in the first place. Because the Court of Appeal did not address that question expressly, however, this Court would have to remand the case for further proceedings before resolving DIRECTV's argument. But given that the case will have little to no prospective significance, the more straightforward course would be to dismiss the case.

That disposition is supported by several other factors. The California Court of Appeal's definitive construction of the Contract under state law is controlling and therefore eliminates any conflict with the Ninth Circuit's previous interpretation of the Contract. This Court's holding that parties will not be presumed to agree to class action arbitral proceedings makes such anti-severability provisions prospectively unnecessary. Finally, DIRECTV's opening brief fails to address this Court's jurisdiction, meaning that the Court will be deprived of an adversarial presentation on that important issue.

Accordingly, the judgment should be affirmed or the writ of certiorari should be dismissed.

ARGUMENT

DIRECTV wants something unprecedented. It wants this Court to overturn a state court's interpretation of state law. That is unheard of, at least in the modern history of federal jurisdiction. DIRECTV's theory is that federal law required the state court to interpret the Contract "according to its terms." But that is exactly what the California Court of Appeal did: it interpreted the words of the agreement; it did not apply any state law to override those terms. In reality, DIRECTV's theory is that the state court did a bad job and produced a result that means this case is litigated rather than arbitrated. Good or bad, the job belongs to the state court, so long as it exhibits no particular hostility to arbitration. In this case, there is no evidence of enmity to arbitral proceedings. So DIRECTV's position, in the end, is that federal courts must closely scrutinize and potentially overturn state court interpretations of arbitration clauses governed by state law, whenever the state court declines to order arbitration. There is no precedent for that proposition, which would drag the federal courts directly into matters that Congress left to state law.

I. This Court's Precedents Establish That State Law Governs The Construction Of An Arbitration Clause, Which May Freely Incorporate State Arbitration Procedures.

The California Court of Appeal held as a matter of California law that DIRECTV and respondents did not agree to arbitrate this dispute. As relevant here, this Court's precedents establish two distinct principles which independently require affirming that judgment. First, under the Act, an arbitration agreement must

be interpreted by its terms, which requires abiding by the state law specified by the agreement's choice-of-law provision. Second, the Act does not preempt the parties' contractual choice to subject their arbitration agreement to state law, including to determine the enforceability of the class action waiver.

In *Volt Information Sciences v. Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468 (1989), the choice-of-law clause of the parties' agreement called for the application of the "law of the place where the project is located," which in that case was California. Applying California law, the California Court of Appeal read the contract to incorporate a state-law arbitration rule – specifically, a rule permitting a court to stay arbitral proceedings pending the completion of related litigation. The petitioner argued that the Court of Appeal's ruling was contrary to the Act, which would have required the arbitration to proceed. This Court disagreed.

The Court explained that the controlling principle under the Act is that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. Therefore, the claim of the petitioner in that case, that the Act prohibited the California Court of Appeal from construing the agreement according to ordinary state law contract principles, "fundamentally misconceives the nature of the rights created by the FAA." *Id.* The state court's determination that the parties had agreed to incorporate state law – including state arbitration law – was not contrary to "an FAA-guaranteed right to compel arbitration, but [was] a finding that it had no such right in the first place,

because the parties' agreement did not require arbitration to proceed in this situation." *Id.* at 475.

This Court found no merit to the petitioner's two arguments to the contrary. First, the Court rejected the contention that the Court of Appeal's failure to apply a presumption favoring arbitration "violates the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration." *Id.* That assertion, the Court explained, fails to recognize that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure enforceability, according to their terms, of private agreements to arbitrate." *Id.* In *Volt*, the contract incorporated and called for the application of California law, so the Court of Appeal had rigorously enforced the terms of the agreement by applying that state's law. *Id.* This Court explained that although "ambiguities as to the *scope* of the arbitration clause itself are resolved in favor of arbitration," that special rule was not implicated by the state court's distinct ruling "that the parties intended the California rules of arbitration to apply." *Id.* at 476.

Second, the Court rejected the petitioner's argument that the Act's procedural provisions, which do not provide for such a stay pending litigation, preempt California's contrary rule. The Court did not doubt that the Act would preempt the stay provision of California law from having effect as a matter of positive law. But that fact was irrelevant, because the Act does "not prevent application of [the California rule] to stay arbitration where, as here, the parties have *agreed* to arbitrate in accordance with California

law." *Id.* (emphasis added). Quite the opposite. The Act "simply requires courts to enforce privately negotiated agreements, like other contracts, in accordance with their terms." *Id.* at 478. "[T]he Act was designed 'to make arbitration agreements as enforceable as other contracts, but not more so.'" *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)) (emphasis added).

On that basis, the Court rejected the petitioner's argument that the Act "prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act," a theory which "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479. "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is" contrary to what the Act would provide itself. *Id.* "By permitting the courts to 'rigorously enforce' such agreements 'according to their terms,' we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Id.*

This Court reaffirmed those principles in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which addressed whether a court or instead an arbitrator should decide whether the petitioner was a party to the arbitration agreement. This Court reasoned from the premise that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *Id.*

at 943 (citations omitted). For that reason, in "deciding whether the parties agreed to arbitrate a certain matter," courts generally "should apply ordinary state-law principles that govern the formation of contracts." *Id.* at 944 (citing, *inter alia*, *Volt*, 489 U.S. at 475-76).

This Court rejected the petitioner's contrary argument that a federal policy in favor of arbitration compelled it to find that all disputes under the agreement would presumptively be decided by the arbitrator. The Court explained that there is no abstract "strong arbitration-related policy" that would give rise to such a presumption, because "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts 'are enforced according to their terms' and according to the intentions of the parties." *Id.* at 947 (quoting *Volt*, 489 U.S. at 479).

Subsequently, this Court specifically made clear that the Act permits the contracting parties to agree to authorize class action arbitration, even when the Act would not permit the state to require class action arbitration procedures by law. In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), the parties' agreement prohibited class-wide arbitration, but California law required it, by deeming such a provision in a consumer contract of adhesion to be unconscionable and therefore unlawful. This Court held that the Act preempted state law from requiring the parties to arbitrate in that fashion. The Court placed significant weight on the "fundamental principle that arbitration is a matter of contract," such

that courts must "enforce [arbitration agreements] according to their terms." *Id.* at 1745 (citing *Volt*, 489 U.S. at 478) (quotation marks and additional citation omitted). The Court reasoned that the state law rule was inconsistent with the Act because it overrode the parties' own agreement with respect to a central element of the arbitral proceedings. *Id.* at 1751-52.

Applying that same logic, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010), the Court ruled that the parties may themselves choose to authorize class action arbitration. In determining the parties' intentions, "the interpretation of an arbitration agreement is generally a matter of state law," albeit subject to the Act's "basic precept that arbitration 'is a matter of consent, not coercion.'" *Id.* at 681 (quoting *Volt*, 489 U.S. at 479). Based on the latter principle, the Court concluded that the parties would not be assumed to have consented to class arbitration when they avowedly had reached "no agreement" on that question. *Id.* at 687.

The Court subsequently distinguished *Stolt-Nielsen*, and refused to overturn an arbitrator's finding that the parties had reached an agreement to permit class action arbitration, in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). The petitioner in that case contended that the arbitrator's ruling contravened a federal policy against class-wide arbitration. The Court disagreed, reiterating that the parties were free to agree to whatever procedures they liked. By contrast, the Act permitted this Court to overturn the arbitrator's reading of the agreement only if the arbitrator had ignored the parties' intentions and imposed his own notion of economic justice. *Id.* at 2068. It was sufficient to sustain the

finding that the parties authorized class action arbitration that "the arbitrator did construe the contract (focusing, per usual, on its language)." *Id.* at 2070.

II. The California Court Of Appeal Was Correct To Interpret The Contract According To California Contract Law.

Under this Court's precedents, the judgment of the California Court of Appeal must be affirmed for two independent reasons. First, under the Act, an arbitration agreement must be interpreted "according to its terms," including the choice-of-law provision requiring that the Court of Appeal apply the law of the state of the customer's residence – here, California. That is exactly what the lower court did. Second, in any event, even if DIRECTV were correct that the "law of your state" includes the preemptive effect of federal law, the result would be the same, because the Act only preempts requirements imposed by positive state law that would override the parties' own agreement. By contrast, the Act does not preempt the parties' own choice to incorporate into their agreement California's state-law prohibition on class action waivers.

A. Under The Act, The Court Of Appeal Correctly Used State Law To Construe The Contract.

DIRECTV asserts that the parties entered into an arbitration agreement, which is governed by the Act. Respondents agree. But the fact that the Act applies to the Contract changes nothing. As DIRECTV itself explains, the applicable principle of federal law under the Act is simply that an arbitration agreement will be enforced "according to its terms." Pet. Br. 11 (major

heading). The statute thus provides that a court may direct the parties to proceed with arbitration "in accordance with the terms of the agreement." 9 U.S.C. § 4.

Critically, the applicable "terms" of course include the agreement's choice-of-law provision, as well as (in this case) its express incorporation of the "law of [that] state" regarding waivers of class action rights. It is not possible to interpret the agreement correctly while ignoring the body of law that the parties chose to direct its interpretation. Here, the Contract provides, with respect to California customers like respondents, that it will be interpreted according to California law. Construing the agreement "according to its terms" therefore requires determining the Contract's meaning under California contract law. That determination was made by the California Court of Appeal in this case: the parties did not intend to arbitrate their disputes.

This Court approved precisely that methodology in *Volt*. There, the California Court of Appeal construed the parties' contract, which was subject to the Act, according to California law. This Court explained that the ruling was perfectly consistent with the principle that arbitration agreements must be construed "according to their terms." 489 U.S. at 475. Because the contract's choice-of-law provision called for the application of California law, this Court concluded, the state court properly looked to that law – rather than a supposed general "federal policy favoring arbitration" – in interpreting the agreement. *Id.* "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules

according to the terms of the agreement is fully consistent with the goals of the FAA." *Id.* at 479.

In fact, DIRECTV itself agreed below that California law controls, a fact it never acknowledges in this Court. DIRECTV explained that, "despite Plaintiffs' efforts to characterize the non-severability clause as unique because it refers to 'the law of your state', the question of whether an FAA-governed arbitration agreement is enforceable or unenforceable due to a generally applicable contract defense is *always a matter of state law*." JA 52 (citation omitted) (emphasis added). DIRECTV's position was simply that its reading of the Contract was superior under "California contract law." *Id.* DIRECTV was right then in acknowledging that state law is controlling; its attempt to now argue the opposite position lacks merit.

Indeed, DIRECTV never articulates a coherent rule supporting its position. At times, it describes the interpretation of an arbitration agreement as a question of "substantive federal law," Br. 12, which it says "serves as an important check on the application of state law," *Id.* 14. Elsewhere, it describes the "interpretation and enforcement of an arbitration agreement governed by the FAA [as] a *hybrid* of state and federal law." *Id.* 13. But DIRECTV never articulates anything resembling an administrable legal rule for courts to identify which matters are assigned to one body of law and which are the province of the other. In particular, it never explains why the construction of the phrase "law of your state" would be resolved as a matter of federal rather than state law. Nor can it explain how to integrate the two bodies of law when the court, as it must, reads all the provisions

of the agreement as a whole. *Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 279 (1956); Cal. Civil Code § 1641.

DIRECTV cannot save its position by resort to a supposed "presumption" that parties intend to arbitrate their disputes. As this Court made clear in *Volt* and *First Options*, *supra*, the Act does not embody such a sweeping assumption about the parties' intention in every case and context. Indeed, in certain circumstances, the applicable presumption is that parties intend *not* to arbitrate. *First Options*, 514 U.S. at 947.

This Court's decisions applying the Act do recognize a presumption that when the parties disagree over whether a particular dispute falls within the *scope* of their arbitration agreement, the presumption is in favor of arbitration. The Act departs from the application of pure state law in that circumstance to impose a "presumption of arbitrability *only* where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at issue." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010) (emphasis added).

For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), the Court concluded that most statutory claims are arbitrable under a general arbitration provision, based on a presumption that the parties would have intended to subject all of their controversies to that agreement. In support, the Court relied on its prior ruling in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967), which applied the same presumption to hold that a claim of fraud in the

inducement of the contract was arbitrable. In both instances, the role of the presumption was simply to reject the assertion that the parties implicitly intended to exclude a particular category of claims from the ambit of an otherwise-encompassing arbitration provision.

The targeted presumption that a dispute falls within an arbitration agreement arises from a common-sense understanding of what the parties themselves probably intended:

> We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.

Granite Rock, 561 U.S. at 303 (citing, *inter alia*, *First Options*, 514 U.S. at 944-45).

DIRECTV would have this Court enact a quite different legal rule. Its proposed presumption is that parties intend not to apply contractual provisions that would, by their terms, render their arbitration agreement ineffective. Here, DIRECTV argues that it and its customers in California presumably did not intend to read "law of your state" to trigger Section 9's anti-severability provision in California.

DIRECTV's proposed rule is completely untethered from this Court's assumption that parties with effective arbitration agreements intend a particular class of disputes to be arbitrable. As in *Volt*,

although "ambiguities as to the *scope* of the arbitration clause itself resolved in favor of arbitration," that special rule is not implicated by the state court's distinct ruling "that the parties intended the California rules of arbitration to apply." *Volt*, 489 U.S. at 476 (emphasis added). And if DIRECTV were correct, then *Volt* – which held that the contract incorporated a state-law rule that inhibited arbitration, despite the invocation of the same supposed presumption – would have come out the other way.

In particular, there is no reason to presume *ex ante* that DIRECTV and respondents intend to negate an arbitration provision under which they would litigate rather than arbitrate. It is at least equally plausible that the parties, having gone to the trouble to include such a provision in the contract, intended for it to have some teeth. That is particularly true when, as here, the meaning of the contractual provision is resolved as a matter of state law. In this case, we know that the phrase "law of your state" refers to California law without regard to preemption under the Act. There is no reason to believe that the parties subjected their agreement to California law but incorrectly presumed that the Contract would mean something very different.

Importantly, the fact that Section 9 contains provisions relating to arbitration does not support an assumption that the parties intended to arbitrate every type of dispute. DIRECTV's suggestion that the presence of an arbitration clause within a contract is evidence that the parties agreed to arbitrate at least some of their disputes may have some force with respect to an ordinary bilateral contract. In that

context, why would the parties have included such a provision if they did presumably intend to use it? But the same inference does not arise from a form contract like this one, which applies to all of DIRECTV's customers, nationwide. Many provisions of such form consumer agreements are governed by state law, which can vary by jurisdiction. When a company wants all of its customers to sign a single nationwide agreement, it regularly provides that certain provisions apply in some states but not others.

That is what happened here. The states vary with respect to whether they prohibit class action waivers. So DIRECTV wrote Section 9 to provide for the arbitration of its disputes with its customers, except any of those living where "the law of your state" would prohibit waiving the class action remedy. DIRECTV could have created a separate contract for its California customers that omitted the arbitration provisions of Section 9 altogether; the result would have been the same. But for its own convenience, it instead used a single nationwide contract which, because Section 9 *was* enforceable in some (indeed, the great majority of) states, includes detailed provisions regarding how any arbitration would be conducted. In particular, DIRECTV's decision to use one customer agreement facilitated making unilateral changes applicable to all of its customers simply by revising the single form contract.

Indeed, DIRECTV itself confirmed that it intended that certain provisions apply in some states and not others. In moving for a stay of this action, DIRECTV acknowledged that

> The Customer Agreement between DIRECTV and its customers provides that the customer's

> home state laws will govern the relationship, and that any disputes will be resolved in individual arbitration if the customer's home state laws enforce the parties' arbitration agreement. Because California law would not enforce the arbitration agreement as between DIRECTV and California customers, DIRECTV has not sought and will not seek to arbitrate disputes with California customers.

JA 52; *see also* JA 143-44.

B. DIRECTV's Argument In Any Event Fails Because The Act Does Not Preempt The Parties' Choice To Incorporate California's Ban On Class Action Waivers Into Their Agreement.

DIRECTV's argument fails for the independent reason that it rests on a false premise: that the Act preempts California's prohibition on class action waivers, even when (as in this case) the parties themselves agree to be bound by that state law rule. DIRECTV argues that no "law of [a customer's] state" in the United States ever prohibits class action waivers with respect to contracts subject to the Act, because all such laws are preempted under *Concepcion*.

This Court rejected exactly that characterization of the Act's preemptive effect in *Volt*; in fact, the parallels are exact. In both cases, the agreement's choice-of-law clause called for the application of California law; the California Court of Appeal construed the agreement to incorporate a California arbitration rule that was inconsistent with the provisions of the Act; and the party favoring arbitration argued that the Act preempted the

California rule. In *Volt*, this Court rejected that argument, holding that the Act does "not prevent application of [the California rule] to stay arbitration where, as here, the parties have *agreed* to arbitrate in accordance with California law." 489 U.S. at 476. To the contrary, holding that the parties' agreement was preempted by the Act "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479.

According to DIRECTV, its contrary position is compelled by *Concepcion*. That is not correct. In *Concepcion*, the parties did not incorporate the relevant provisions of California law into their arbitration agreement. Quite the opposite: the plaintiffs argued that California law overrode the terms of the agreement. This Court reasoned that, because arbitration is a matter of contract, the Act does not permit positive state law to require the parties to make class action arbitration available. As DIRECTV explains, *Concepcion*'s actual holding is that "state law cannot *force* people to arbitrate on a classwide basis." Pet. Br. 1 (emphasis added).

This case, by contrast, is analogous to *Oxford Health*. Here, the Contract is subject to California law not by operation of law, but as a result of the choice-of-law provision to which the parties agreed. Section 9 then expressly incorporates state law – here, California law, including particularly the provision of the California Consumers Legal Remedies Act prohibiting the waiver of the right to pursue a claim under class action procedures. The parties were free to make that choice, which is not overridden by *Concepcion*. As DIRECTV acknowledges, Br. 15, and

Stolt-Nielsen holds, parties are free to choose whatever state rules they want, including rules that are contrary to the result that would obtain under the Act's own provisions.

Thus, in *Oxford Health*, this Court deferred to the arbitrator's determination that the parties' contract provided for class-wide arbitration, rejecting the petitioner's argument that this interpretation could not be reconciled with *Concepcion*. DIRECTV's argument faces an even more substantial hurdle than the failed invocation of *Concepcion* in *Oxford Health*. At least in *Oxford Health*, a federal court would overturn an arbitrator's ruling under the Act, albeit in limited circumstances. *Oxford Health*, 133 S. Ct. at 2068 (citing 9 U.S.C. § 10(a)(4)). By contrast, no provision of the Act authorizes overturning a state court's conclusion that as a matter of state law the parties' agreement by its terms renders the agreement's arbitration clause unenforceable.

In fact, the result in this case would be the same even if this Court were to accept DIRECTV's invitation to construe the Contract de novo. In *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995), this Court considered an arbitration agreement subject to New York law. Invoking *Volt*, the respondent argued that the agreement thereby incorporated New York arbitration law – in particular, that state's prohibition on arbitrators imposing punitive damages. But this Court disagreed, recognizing a critical distinction between the cases. *Volt* was a case in which, because it arose from a state court's construction of the parties' agreement, "we did not interpret the contract de novo. Instead, we deferred to the California court's construction of its own State's laws." *Id.* at 59 n.4. By

contrast, the contract in *Mastrobuono* was not subject to a binding state court interpretation because it had only been construed by a federal court of appeals. *Id.* Construing the contract *de novo*, this Court concluded that because the agreement did not by its terms include New York arbitration law, it was properly read to incorporate the "substantive principles that New York courts would apply, but *not* to include special rules limiting the authority of arbitrators." *Id.* at 64 (emphasis added).

Thus, in *Mastrobuono*, the Court applied the legal principle announced in *Volt* that the Act does not preempt state law that the parties choose to incorporate into their agreement. *Mastrobuono* simply found that the language of the contract before it was not sufficiently clear on de novo review to incorporate New York's rule against arbitrators awarding punitive damage awards. But here, unlike *Mastrobuono*, there is no ambiguity about what state law the parties incorporated. Section 9 *expressly* incorporates state law prohibitions on class action waivers.

At the very least, the members of the Court who dissented in *Concepcion* should perceive no need to extend that ruling to these distinct circumstances. Furthermore, respondents ask that Justice Thomas adhere to his view that the Act does not apply to cases, like this one, that originate in state court and raise state law claims. *E.g.*, *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S.

279, 314-15 (2002) (Thomas, J., dissenting); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285-97 (1995) (Thomas, J., dissenting).[1]

III. There Is No Merit To DIRECTV's Irrelevant Criticisms Of The Court Of Appeal's Reading Of The Contract.

1. For the foregoing reasons, the Contract is governed by California law, which the California Court of Appeal has definitively construed to conclude that the parties did not agree to arbitrate their disputes. That holding is unassailable in this Court, which does not sit to review the application of state law. *Volt*, 489 U.S. at 474.

DIRECTV thus turns this Court's rulings on its head when it invokes *Volt* and *Stolt-Nielsen* for the proposition that the California Court of Appeal's ruling "cannot stand as a matter of substantive federal law, as it manifestly fails to enforce the parties' arbitration agreement 'according to [its] terms.'" Br. 17 (quoting *Stolt-Nielsen*, 559 U.S. at 682 (quoting, in turn, *Volt*, 489 U.S. at 479)). In *Volt*, the Court refused to override the California Court of Appeal's ruling construing the parties' agreement as a matter of

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[1] DIRECTV does not identify any other applicable requirement of the Act that calls into question the California Court of Appeal's determination to interpret the Contract on the basis of ordinary California contract law. Respondents are aware of none. There is no suggestion that the Court of Appeal applied a unique set of interpretive principles that discriminate against arbitration. Nor did the court rest its ruling on its own views of economic justice rather than interpreting the parties' agreement. *Cf. Oxford Health*, 133 S. Ct. at 2069-70.

California law, rejecting the claim that there was a general federal policy favoring arbitration or that the Act otherwise preempted the lower court's decision. Similarly, in *Stolt-Nielsen*, the Court refused to override an arbitrator's determination that the parties' agreement authorized class-wide arbitration, rejecting the assertion that such a construction was contrary to principles embodied in the Act. Both decisions thus stand for the proposition that this Court does not sit to revisit the conclusion that the parties have entered into agreements that either limit arbitration (as in *Volt*) or require that it be conducted under certain rules (as in *Stolt-Nielsen*).

Volt also illustrates DIRECTV's error in repeatedly relying on the contrary reading of the Contract adopted by *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013). In *Murphy*, the Ninth Circuit attempted to determine the Contract's meaning, which as noted is a question of California law. *Id.* at 1227. Because the California Court of Appeal subsequently construed the Contract, its ruling by definition supplants the federal court's interpretation adopted in *Murphy*. *See* 28 U.S.C.A. § 1652; *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938). The fact that a federal court would read state law differently and give a different reading to the agreement is of no moment. *Volt*, 489 U.S. at 470.

2. DIRECTV's argument that on a de novo reading of the Contract this Court would adopt a different interpretation are therefore beside the point. But in any event, for the reasons given by the California Court of Appeal, the contract is *at the very least* ambiguous. Pet. App. 10a-11a. And as this Court has recognized, that ambiguity is properly

resolved against DIRECTV as the party that drafted this form contract of adhesion. *Mastrobuono*, 514 U.S. at 62-63.

DIRECTV relies heavily on the fact that the Contract expressly provides that the Act applies to Section 9. But as discussed, that adds nothing. DIRECTV reads that provision to refer to the Act's preemptive effect. But as the California Court of Appeal concluded, the more specific incorporation of the "law of [the customer's] state" controls over the general application of the Act. Pet. App. 12a.

In any event, DIRECTV concedes that there is no conflict between the result below and the Act, which freely permits the parties to incorporate provisions of state law that would produce a different result than the Act. In *Volt*, for example, the parties were free to incorporate California's rule allowing stays of arbitral proceedings, notwithstanding that the Act itself would require the arbitration to proceed. And in *Stolt-Nielsen*, the parties were free to authorize class action arbitral procedures, notwithstanding that the Act would preempt state laws requiring those procedures.

DIRECTV's contrary argument pretends that the Contract exclusively subjects Section 9 to principles of preemption under the Act. On its view, the parties only incorporated the Act's prohibition on state law requiring the parties to permit class action procedures. But that is not what the Contract says. Instead, the Contract simply provides that the Act governs the arbitration clause. In turn, for the reasons discussed in Part II, *supra*, the Act calls for the Contract to be construed consistent with its "terms," including the choice-of-law provision, which incorporates California law. The state court's

conclusion that the parties did not agree to arbitrate their disputes thus does not violate any right of DIRECTV under the Act, but is instead "a finding that it had no such right in the first place." *Volt*, 489 U.S. at 475.

DIRECTV next asserts that the parties obviously intended to arbitrate their disputes, if possible. But at the time the operative version of the Contract took effect, the parties plainly intended to litigate and *not* to arbitrate. So too at the time respondents initiated this action. Look no further than the fact that when this litigation commenced, DIRECTV did not seek to compel arbitration and affirmatively represented to the trial court that it would not move to compel arbitration of the respondents in this matter. JA 52, 143-44.

At those times, DIRECTV and any consumer who considered the question would both have regarded all of Section 9 as unenforceable by its terms because California law prohibited waiver of class and representative actions in any forum, including arbitration. Indeed, that was in fact how DIRECTV itself understood Section 9. Even assuming the parties considered whether the Act preempted such a law, no court had held that it was.

Nor is there anything anomalous about the mechanism by which the parties memorialized their choice not to arbitrate. The Contract incorporates the law of the state in which the consumer resides. On its face, the agreement reflects a perfectly sensible, voluntary decision to abide by state laws that protect consumers by forbidding agreements that preclude class action procedures.

DIRECTV's contrary position must be that the parties expected that a duty to arbitrate would spring into existence if California law was later found to be preempted. But because contracts depend on the parties' intent, they are generally interpreted according to the circumstances as they stood when they are formed. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984).

That rule makes the most sense with respect to the interpretation of a contract – like this one – in which one party (DIRECTV) claims the unilateral right to change it prospectively at any time. JA 127 ¶ 4. The contracting parties do not need the agreement to account for unexpected changes in the law, because those can instead be addressed through unilateral revisions without the parties needing to go to the trouble of entering into a new agreement. Indeed, after this Court decided *Concepcion*, DIRECTV unilaterally modified the Contract's arbitration provision to eliminate the "law of the state" phrasing of Section 9.

But DIRECTV's interpretation suffers from an even deeper implausibility. In this case, DIRECTV sought to compel arbitration after the proceedings had been underway in state court for almost three years. DIRECTV's position thus is not merely that the parties intended their agreement to account for changing conceptions of federal preemption, but that they intended the obligation to arbitrate to attach after the parties were out of the contract and in the middle (or even near the end) of litigating the dispute. That is on its face an extremely unlikely description of how the parties believed their agreement would operate. The purpose of arbitration is to resolve the

parties' disputes more efficiently. *Concepcion*, 131 S. Ct. at 1751. But on DIRECTV's view, years of effort in bringing the dispute to a final resolution would be cast aside – and the entire matter litigated all over in numerous separate arbitrations – based on an unexpected change in the understanding of whether the state law they incorporated into the agreement was preempted.

DIRECTV emphatically argues that its own intention was to arbitrate whenever possible, including whenever it became apparent that California's prohibition on class action waivers was preempted. That is an entirely self-interested assertion advanced well after the Contract was formed, and it is just as plausible that DIRECTV wanted to know with certainty in advance whether claims would be arbitrated or instead litigated in any given state. But in all events, contracts require mutual assent, and there is every reason to believe that consumers believed they were fully protected under California law, because the contract said so. To the extent the parties read the Contract differently, it is construed against DIRECTV, which drafted it. Pet. App. 10a.

There is no merit to DIRECTV's further argument that the phrase "law of your state" necessarily requires incorporating the determination whether state law is preempted. Importantly, the closely related provisions of Section 10 of the Contract expressly distinguish the law of the customer's state from federal law. JA 129 ("The interpretation and enforcement of this agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable

federal laws, and the laws of the state and local area where the service is provided to you.").

Ordinary usage also distinguishes the requirements of state law from the further question whether that state law is preempted by federal law. The answer to the question whether "California law" prohibits class action waivers is naturally "yes," not (as DIRECTV would have it) "no." Both DIRECTV's brief and this Court's ruling in *Concepcion* illustrate the point. *See* Pet. Br. 1 ("Any state law that conditions the enforceability of an arbitration agreement on the availability of classwide arbitration, this Court held, is preempted by the Federal Arbitration Act (FAA)."); *Concepcion*, 131 S. Ct. at 1746 ("Under California law, courts may refuse to enforce any contract found 'to have been unconscionable at the time it was made,' or may 'limit the application of any unconscionable clause.'" (quoting Cal. Civ. Code Ann. § 1670.5(a)). So does the constitutional provision on which DIRECTV rests its argument – the Supremacy Clause. U.S. Const. art. VI, cl. 2 (federal law is "the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding"). *Compare C&L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 419 (2011) ("By selecting Oklahoma law ('the law of the place where the Project is located') to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act." (citations omitted)) *with Fidelity Fed. Sav. & Loan v. De la Cuesta*, 458 U.S. 141, 157 n.12 (1982) ("law of the *jurisdiction*" in context of federal banking law "includes federal as well as state law" (emphasis added)).

DIRECTV's contrary position is that Section 9 is properly read effectively to ask whether a class action waiver is lawful – *i.e.*, whether it would be prohibited by "law." But the Contract is not naturally interpreted that way. On DIRECTV's view, the anti-severability clause has no purpose, because no state law triggers its provisions. At the very least, by looking to the requirements of "law" generally, DIRECTV's reading turns the words "of your state" in Section 9's operative language into surplusage. They serve only to mislead. It is a settled principle of contract interpretation, however, that the words of the agreement should be given meaning where possible. *Valencia v. Smyth*, 185 Cal. App. 4th 153, 176 (2010). No ordinary consumer reading the agreement would understand its provisions to lack force in the manner DIRECTV describes.

If DIRECTV were right that the parties instead intended the enforceability of Section 9 to turn on whether a court would find the class action waiver *valid*, they would have said so expressly. The Contract's general severability clause, for example, looks to whether a provision of the Contract "is declared" to be unlawful. JA 129 ¶ 10(d).

Even more striking, that is precisely how DIRECTV wrote Section 9's anti-severability provision in the version of the Contract prior to the one in effect in this case. Prior to mid-2006, Section 9(c) had instead provided: "A court may sever any provision of Section 9 that it finds to be unenforceable, except for the prohibition on class or representative arbitration." JA 121. Then, after this Court decided *Concepcion*, it reverted to that language. The current version, effective as of June 24, 2015, provides: "A court may

sever any portion of Section 9 that it finds to be unenforceable, except for the prohibition on class, representative and private attorney general arbitration."
http://www.directv.com/learn/pdf/residential_customer_agreement.pdf (last accessed July 17, 2015)

An exhaustive review of the arbitration provisions of the form customer agreements of the Fortune 500 companies reveals that such provisions are commonplace.[2] No other major company used or uses

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[2] For example, Ally Financial, Inc.'s retail installment sale contract/lease agreement states, "[i]f the agreement to arbitrate on an individual basis and not on a class basis is deemed or found to be unenforceable in a case in which class action allegations have been made, the remainder of this arbitration provision will be unenforceable." http://www.gmaconline.com/docs/AllyArbitrationAgreement.pdf (last accessed July 17, 2015); Dillard's Inc.'s Credit Card Agreement states, "[i]f any of the provisions of this Arbitration Agreement dealing with class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, that invalid provision shall not be severable and this entire Arbitration Agreement shall be unenforceable. https://retailservices.wellsfargo.com/pdf/ccra/dillards-credit-card.pdf (last accessed July 17, 2015). Mastercard's Credit Card Agreement states, "[i]f any of the provisions of this Arbitration Agreement dealing with class action, class arbitration, private attorney general action, other representative action, joinder, or consolidation is found to be illegal or unenforceable, that invalid provision shall not be severable and this entire Arbitration Agreement shall be unenforceable." http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/creditcardagreement_5181.pdf (last accessed July 17, 2015). Microsoft's Customer Agreement states, "[i]f the class action waiver in section 10.4 is found to be illegal or unenforceable as to all or some parts of a dispute, then section 10

the novel "law of your state" formulation at issue in this case; not even DIRECTV does at this point in time.

DIRECTV's final argument that under the Contract there can be no such thing as "state law" divorced from the preemptive effect of federal law is obviously meritless. Unquestionably, the California law in question does "exist": The California's Consumer Legal Remedies Act *is* the law of the State of California. Undoubtedly, it continues to apply in cases not subject to the Act.

In any event, DIRECTV is describing the distinct operation of positive law – *i.e.*, the fact that state law cannot impose legal requirements without accounting for the effect of the Supremacy Clause. In this case, by contrast, "California law" does not apply to the parties' agreement of its own force. Here, the parties

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won't apply to those parts. Instead, those parts will be severed and proceed in a court of law, with the remaining parts proceeding in arbitration." http://windows.microsoft.com/en-us/windows/microsoft-services-agreement (last accessed July 17, 2015); The Western Union Company's agreement states, "[t]his agreement is governed by the Federal Arbitration Act, and any award shall be subject to judicial confirmation. Any arbitration shall take place on an individual basis; class actions or arbitrations are not permitted. If any part of this paragraph is deemed invalid, it shall not invalidate the other parts." https://www.westernunion.com/us/en/terms-conditions.html (last accessed July 17, 2015). Whirlpool Corporation's Extended Service Plan Agreement states, "If any portion of this Provision is deemed invalid or unenforceable, it shall not invalidate the remaining portions of the Provision, except that in no event shall this Provision be amended or construed to permit arbitration on behalf of a group or class." https://www.whirlpoolextendedserviceplans.com/Home/TermsConditions_USA (last accessed July 17, 2015).

agreed to incorporate that law themselves. The Act left them perfectly free to do just that. As DIRECTV explains, "[p]arties to arbitration agreements (like any other contracts), after all, are free to choose the law that will govern the interpretation and enforcement of their agreements." Br. 15. So "[c]ontracting parties can always choose, of course, to bind themselves by reference to state law that has been 'nullified' by federal law, just as they can choose to bind themselves to the rules of a board game." *Id.* 20. As the California Court of Appeal concluded as a matter of California law, that is what they did here.

DIRECTV of course also could have provided explicitly in the Contract that principles of preemption under the Act override state arbitration law, as many companies do. *See, e.g.*, Alcoa Inc.'s Sales Agreement, "[n]otwithstanding anything to the contrary herein, the arbitration provisions set forth herein, and any arbitration conducted thereunder, shall be governed exclusively by the Federal Arbitration Act, Title 9 United States Code, to the exclusion of any state or municipal law of arbitration." https://www.alcoa.com/primary_na/en/pdf/AMM_Sales_Terms_and_Conditions.pdf (last accessed July 14, 2015); Bank of America's Customer Agreement, "[t]his Agreement, and your and our rights and obligations under this Agreement, are governed by and interpreted according to federal law and the law of the state where your account is located... If state and federal law are inconsistent, or if state law is preempted by federal law, federal law governs." https://www.bankofamerica.com/deposits/resources/deposit-agreements.go (last accessed July 14, 2015); PulteGroup, Inc.'s agreement, "[t]his Warranty, including, but not limited to, the arbitration provision, will be governed by the Federal

Arbitration Act ('FAA') which overrides and preempts certain state, local, or other laws concerning arbitration, including, but not limited to, laws that have the purpose of defeating or restricting arbitration."
http://www.pulte.com/assets/pdf/PulteProtectionPlan.pdf (last accessed July 14, 2015); and Windstream Holdings, Inc.'s, "[t]he interpretation and enforceability of the arbitration provisions, and whether a dispute is subject to arbitration, is subject to the Federal Arbitration Act ('FAA') only and not state law." http://www.windstream.com/Terms-and-Conditions/ (last accessed July 14, 2015).

IV. The Court May Conclude That The Better Course Is To Dismiss The Writ Of Certiorari As Improvidently Granted.

This Court should not adopt DIRECTV's argument for the further reason that it would require deciding the case on the basis of what is, at best, a doubtful premise: that the Court of Appeal interpreted an arbitration agreement. The better view is that the court instead decided the antecedent question whether the parties entered into an arbitration agreement at all. DIRECTV's apparent view is that because Section 9 appears in the Contract, and Section 9 addresses the subject of arbitration, the parties *ipso facto* had entered into an "arbitration agreement." Br. 1, 14. More narrowly, DIRECTV may maintain (though it does not argue in its opening brief) that certain claims that could be brought under the Contract – such as a purely personal dispute with an individual customer – would be arbitrable under Section 9 because they do not implicate California's prohibition on class action waivers.

The anti-severability clause, however, is better read as categorical – *i.e.*, it provides either that all disputes with customers residing within a single state are arbitrable, or that none are. The Contract thus turns broadly on whether its prohibition on class action waivers is lawful in the consumer's state, not whether it is unlawful with respect to a particular claim.

Indeed, and as DIRECTV admitted, the *whole point* of Section 9's "anti-severability" clause is to ensure that parties in the states that would find this agreement to dispense with class procedures unenforceable (such as California) do *not* form an agreement to arbitrate. If the parties merely intended not to arbitrate a dispute for which the plaintiffs had an unwaivable right to class action procedures, they could have said that. The general rule under the Contract is thus that any provisions deemed to be prohibited by law will be severed, leaving the rest of the agreement intact. Under that provision, if the class action waiver were invalid it would be severed; arbitration would proceed on a class or individual basis as the circumstances warranted.

But DIRECTV took great care to write Section 9 very differently. The anti-severability clause renders unenforceable the *entire* arbitration provision. Thus, where the anti-severability clause applies, the parties will not arbitrate even claims that would only be litigated individually. Indeed, the provision must operate in that fashion, because it will often be uncertain at the outset of a case whether the plaintiffs will seek to proceed as a class.

DIRECTV wrote the agreement to include the anti-severability provision for one reason only: to

make clear beyond doubt that, in states that prohibit class action waivers, the parties would not agree to arbitrate any disputes between them. As petitioner's *amicus* explains, without such a provision, DIRECTV perceived a risk that it could be subject to penalties for employing an arbitration provision in its customer agreement that on its face included what state law regards as an unconscionable class action prohibition. New England Foundation Amicus Br. 8. That risk would exist if DIRECTV were to arbitrate only individual claims, not class actions.

The dispositive fact under the Contract is thus that California law prohibits class action waivers. The provisions of Section 9 relating to arbitration are accordingly always "unenforceable" because the law of California "would find this agreement to dispense with class arbitration procedures unenforceable." The Court of Appeal accordingly stated as its holding: "The class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable." Pet. App. 15a. And as DIRECTV itself explains, the court thereby held that "the proviso nullifies the arbitration agreement." Br. 8; *see also* Pet. for Cert. 8.

The better view is thus that the question before the Court of Appeal was not how to construe an arbitration agreement, but instead whether the parties had *formed* an agreement "to settle by arbitration a controversy thereafter arising out of [their] contract." 9 U.S.C. § 2. "[W]here the dispute at issue concerns contract formation," the issue is decided "'apply[ing] ordinary principles that govern the formation of contracts.'" *Granite Rock*, 561 U.S. at 296 (quoting *First Options*, 514 U.S. at 944 (citing, in

turn, *inter alia*, *Mastrobuono*, 514 U.S. at 62-63; *Volt*, 489 U.S. at 475-76)). That conclusion follows from "the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent,' and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.'" *Id.* at 299 (quoting *Volt*, 489 U.S. at 479, and *First Options*, 514 U.S. at 943).

DIRECTV's repeated assertion that the "Court of Appeal transformed an agreement that *forbids* class arbitration into an agreement that *requires* class arbitration to be enforceable," Br. 2, is thus nothing more than empty rhetoric. Having specifically written Section 9's anti-severability provision to provide categorically that no agreement to arbitrate existed, DIRECTV cannot now take the opposite position that the parties entered into an arbitration agreement that must be construed to favor submitting the parties' dispute to arbitration.

We nonetheless recognize, however, that the Court of Appeal itself never clearly specified whether it was deciding the threshold question whether the parties entered into an arbitration agreement or instead recognized that such an agreement exists. As noted, the opinion describes the "entire agreement" as "unenforceable," not merely inapplicable in a case such as this one. Pet. App. 15a. On the other hand, at times, the opinion refers to an "arbitration agreement," but seemingly only in the colloquial sense of an agreement respecting the subject of an arbitration, as opposed to a contract to resolve disputes by arbitration. *Id.* 3a. Further, in a footnote, the Court of Appeal acknowledged DIRECTV's argument that certain of respondents' claims were not

subject to California's prohibition on class action waivers. The court rejected that argument on the narrower ground that the Contract's anti-severability clause renders Section 9 unenforceable so long as California law prohibits such a waiver with respect any of the plaintiff's claims. It did not endorse DIRECTV's premise that certain types of claims could be subject to arbitration under the Contract. Pet. App. 15a n.5.

Because DIRECTV cannot establish the premise of its argument – *i.e.*, that the parties entered into an arbitration agreement, which is itself a distinct question of state law – the judgment cannot be affirmed without further guidance provided by a remand to the California Court of Appeal. The better course, however, may simply be to dismiss the petition as improvidently granted. For the reasons described in Part I, *supra*, the law governing the case is well settled. A ruling by this Court in unlikely to illuminate any clouded questions regarding the application of the Act.

Although this Court likely concluded that granting review would resolve the inconsistency between the California Court of Appeal's reading of the Contract and the reading adopted by the Ninth Circuit in *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013), there is no conflict as a prospective matter, for several reasons. As discussed, because the Contract is properly construed as a matter of state law, the state court's ruling in this case supplants the federal court's contrary reading of the document. The language of the Contract itself has no broader significance, given that almost no other entity uses it, not even DIRECTV any longer. Even more significant,

in the wake of this Court's rulings in *Concepcion* and *Stolt-Nielsen*, parties seeking to avoid state prohibitions on class action waivers need not include any language in their contracts at all. Silence will be construed not to be assent to class action arbitration, and contrary state law is preempted.

The Court should also be concerned about the lack of adversarial presentation in the case with respect to several issues. As discussed, on the merits, DIRECTV's entire opening brief rests on the premise that the parties entered into an "arbitration agreement." But the brief includes not a word explaining why that is so, notwithstanding that DIRECTV knew that respondents' principal position was that no such agreement had been formed. BIO 7. Many of DIRECTV's arguments on the principal issue in the case will therefore appear for the first time in its reply brief, when it is too late for respondents to reply.

DIRECTV's opening brief also fails to explain this Court's jurisdiction, in either of two important respects. Supreme Court Rule 14(g)(i) provides that the petition for certiorari must specify when, in all the lower courts, "the federal questions sought to be reviewed were raised." Rule 24(e) provides that the petitioner's brief on the merits must explain "the basis for jurisdiction in this Court." But DIRECTV did not seriously do either, such that respondents are unable to address its position on either issue.

DIRECTV states that it moved to compel arbitration in the trial court "[i]n light of *Concepcion*," Pet. 7, but then says nothing about the arguments it presented to the Court of Appeal or California Supreme Court, *Id.* 7-8. In fact, as discussed,

DIRECTV previously agreed that under the Act state law controls. Later, DIRECTV took the position that state law controls except in the limited circumstances that it is preempted by the Act. *E.g.*, DIRECTV Memo. In Support Of Motion To Motion To Compel Arbitration at *Id.* 7-9, 11-12. But even that argument did not include its current theory that federal contract law supplants state law. DIRECTV did not even argue substantially in the trial court or on appeal that the Act requires a presumption in favor of arbitration, much less resolving all doubts in favor of arbitration. Although respondents did not raise this argument in the brief in opposition, that is easily explained: DIRECTV's argument in its merits brief has evolved substantially from the petition for certiorari.

DIRECTV also summarily asserts in its merits brief that this Court has jurisdiction under 28 U.S.C. § 1257(a). Br. 3. But that statute applies to "final" judgments, whereas the Court of Appeal's judgment in this case is interlocutory. DIRECTV presumably would argue that the ruling below imperils the interests protected by the Act. But it has never articulated the basis for that position, including by explaining whether or not it intends to pursue any other arguments under the Act on remand. (Its "jurisdictional" argument in the certiorari reply brief related only to whether the case raises a question of federal law.) So respondents are unable to address whatever theory DIRECTV might advance.

For the foregoing reasons, the Court may conclude that the appropriate course is simply to dismiss the petition for certiorari as improvidently granted.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed or the writ of certiorari dismissed.

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July 20, 2015

APPENDIX

APPENDIX

FEDERAL ARBITRATION ACT

9 U.S.C. § 1

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil

Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CALIFORNIA CONSUMER LEGAL REMEDIES ACT

California Civil Code § 1751

Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

California Civil Code § 1752

The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law.

Nothing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions. Class actions by consumers brought under the specific provisions of Chapter 3 (commencing with Section 1770) of this title shall be governed exclusively by the provisions of Chapter 4 (commencing with Section 1780); however, this shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law.

California Civil Code § 1753

If any provision of this title or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the title and the application of such provision to other persons or circumstances shall not be affected thereby.

California Civil Code § 1760

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

California Civil Code § 178

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:(1) It is impracticable to bring all members of the class before the court.(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.(4) The representative plaintiffs will fairly and adequately protect the interests of the class.(c) If notice of the time and place of the hearing is served upon the other

parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:(1) A class action pursuant to subdivision (b) is proper.(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.(3) The action is without merit or there is no defense to the action. A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a).(d) If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.(e) The notice required by subdivision (d) shall include the following:(1) The court will exclude the member notified from the class if he so requests by a specified date.(2) The judgment, whether favorable or not, will include all members who do not request exclusion.(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did

not request exclusion.(g) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The best possible notice of the judgment shall be given in such manner as the court directs to each member who was personally served with notice pursuant to subdivision (d) and did not request exclusion.

No. 14-462

IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. State Law Rules Governing Contract Interpretation And Enforcement Are Subject To Long-Established Limitations Imposed By The FAA 3

II. The Court Below Erred By Refusing To Enforce The Parties' Arbitration Agreement. 13

III. Respondents' Arguments In Favor Of Dismissal Are Unavailing. 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Ackerberg v. Johnson,
892 F.2d 1328 (8th Cir. 1989) 18

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....10

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 11, 12, 17, 19, 23

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....3, 20

Cohen v. DIRECTV, Inc.,
48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006).....23

CompuCredit Corp. v. Greenwood,
132 S. Ct. 665 (2012) 7

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996).....5

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982).....17

Fisher v. A.G. Becker Paribas Inc.,
791 F.2d 691 (9th Cir. 1986) 18

Granite Rock Co. v.
International B'hood of Teamsters,
561 U.S. 287 (2010).....10

Huffman v. Hilltop Cos.,
747 F.3d 391 (6th Cir. 2014) 16

Iskanian v. CLS Transp. L.A., LLC,
327 P.3d 129 (Cal. 2014).....18

KPMG LLP v. Cocchi,
132 S. Ct. 23 (2011) (*per curiam*) 11

Marmet Health Care Ctr., Inc. v. Brown,
132 S. Ct. 1201 (2012) (*per curiam*) 10

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 3, 7, 15, 16

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1, 24 (1983).....3, 4, 5, 7, 18

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 1, 12, 13

Mutual Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 17

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*) 7, 10

Oklahoma City v. Tuttle,
471 U.S. 808 (1985).....22

Oxford Health Plans LLC v. Sutter,
133 S. Ct. 2064 (2013) 6, 7

Perry v. Thomas,
482 U.S. 483 (1987).....22

Preston v. Ferrer,
552 U.S. 346 (2008).....5, 10

Rent-A-Center West, Inc. v. Jackson,
561 U.S. 63 (2010) 20

Rodriguez v. American Techs., Inc.,
39 Cal. Rptr. 3d 437 (Cal. Ct. App. 2006) 11

Sanchez v. Valencia Holding Co.,
__ P.3d __, 2015 WL 4605381
(Cal. Aug. 3, 2015) 12

Southland Corp. v. Keating,
465 U.S. 1 (1984) 22

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 5, 6, 13

Vaden v. Discover Bank,
556 U.S. 49 (2009) 10

Volt Info. Scis., Inc. v.
Board of Trs. of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989) 4, 5, 7, 11, 13, 16

Statutes and Rules

9 U.S.C. § 2 21

28 U.S.C. § 1257 22

28 U.S.C. § 1257(a) 21

S. Ct. R. 14(g)(i) 22

S. Ct. R. 15.2 ..... 10, 22

INTRODUCTION

Respondents struggle mightily to transform an easy case into a hard one. The parties here agreed to arbitrate their disputes unless "the law of your state" would require classwide arbitration, and specified that the Federal Arbitration Act (FAA) governs their arbitration agreement. The FAA preempts state law that requires classwide arbitration. Respondents argue that the reference to "the law of your state" in an agreement governed by the FAA refers to state law *preempted* by the FAA. That suggestion—as the Ninth Circuit recognized in interpreting the very agreement at issue here—is "nonsensical." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013).

Respondents' primary answer is that the interpretation of arbitration agreements governed by the FAA is *entirely* a matter of state law, and that state courts are free to interpret such agreements as they wish—even if their interpretation is nonsensical. That position is not just nonsensical, but truly radical. Although state law generally provides the background rules governing contract interpretation, it always remains subject to federal substantive arbitration law established by the FAA. And, as this Court has stated time and again, such federal substantive law requires courts, among other things, to construe arbitration agreements with a healthy regard for the federal policy favoring arbitration, and resolve any doubts in favor of arbitration. Were the law otherwise, state law could defeat at will the federal right to enforce an arbitration agreement.

Once it is understood that the FAA imposes federal substantive limits on the interpretation and enforcement of arbitration agreements, respondents have remarkably little to say. They cannot possibly establish that the state court here interpreted the parties' arbitration agreement with a healthy regard for the federal policy favoring arbitration, or resolved any doubts in favor of arbitration, as this Court's precedents require. To the contrary, the court below declared that the arbitration agreement here is amenable to two interpretations—one in which the parties' arbitration agreement is enforceable, and one in which it is not—and simply chose the arbitration-hostile interpretation. As a matter of federal substantive law, the court below was not free to make that choice.

Respondents fare no better by urging this Court to dismiss the writ as improvidently granted. Rather, they simply rehash arguments that they made, without success, in opposing the writ in the first place. Just as this Court rejected those arguments then, it should reject them now.

At bottom, respondents are inviting this Court to roll back decades of settled federal arbitration law by holding that the interpretation of an arbitration agreement governed by the FAA is entirely a matter of state law. This Court should decline the invitation, reaffirm the longstanding rule that state contract law in this context is subject to limits imposed by federal arbitration law, and reverse the judgment.

ARGUMENT

I. State Law Rules Governing Contract Interpretation And Enforcement Are Subject To Long-Established Limitations Imposed By The FAA.

Respondents begin their argument by asserting that "DIRECTV wants something unprecedented"—"[i]t wants this Court to overturn a state court's interpretation of state law." Resps. Br. 11. But that assertion assumes that the interpretation and enforcement of an arbitration agreement governed by the FAA is *entirely* a matter of state law, and that the FAA has no role to play. That assumption is manifestly incorrect.

This Court has long recognized that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," and applicable "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-49 (2006) (holding, as a matter of federal substantive law, that an arbitration clause is severable from the rest of the contract *regardless* of contrary state law). Such federal substantive law applies, as relevant here, to "the construction of the contract language itself." *Moses H. Cone*, 460 U.S. at 25; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995). And such federal substantive law requires courts, among other things, to interpret arbitration agreements "with a healthy regard for the federal policy favoring arbitration," and to resolve "any

doubts" in favor of arbitration. *Moses H. Cone*, 460 U.S. at 24-25.

Respondents insist, however, that "this Court's precedents establish that state law governs the construction of an arbitration clause." Resps. Br. 11 (capitalization modified); *see also id.* at 6 (asserting that it is a "settled principle under the [FAA] that state law determines the meaning of arbitration provisions in ordinary contracts like this one"). That argument is impossible to square with the precedents cited above, and respondents make no effort to do so.

Rather, they base their argument on the unremarkable proposition, articulated by this Court in *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, that "'the interpretation of private contracts is *ordinarily* a question of state law, which this Court does not sit to review.'" Resps. Br. 12 (emphasis added; quoting 489 U.S. 468, 474 (1989)). In their view, *Volt* establishes that the interpretation of an arbitration agreement governed by the FAA is *entirely* a matter of state law, and that a state court's interpretation of such an agreement is thus "unassailable" in this Court. *Id.* at 28. But that gets *Volt* exactly backwards. That case recognizes that federal substantive arbitration law "establish[es] that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 475-76 (internal citation omitted). It is not true,

thus, that *Volt* "reject[ed] the claim that there was a general federal policy favoring arbitration." Resps. Br. 29.

Nor is it true that, "if DIRECTV were correct, then *Volt*—which held that the contract incorporated a state-law rule that *inhibited* arbitration, despite the invocation of the same supposed presumption—would have come out the other way." *Id.* at 22 (emphasis added). The *Volt* Court upheld the state court's interpretation of the arbitration agreement to incorporate state procedural rules precisely because it concluded that "the California arbitration rules which the parties have incorporated into their contract generally *foster* the federal policy favoring arbitration." 489 U.S. at 476 n.5 (emphasis added); *see also id.* at 476 ("Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to *encourage* resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.") (emphasis added). *Volt*, in short, was not a case—like this one—where a state court invoked state law to thwart federal arbitration rights. *See generally Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) ("The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."); *see also Preston v. Ferrer*, 552 U.S. 346, 361 (2008).

Just as respondents' reliance on *Volt* is misplaced, so too are their efforts to distinguish *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). They assert that "in *Stolt-Nielsen*, the Court *refused*

to override an arbitrator's determination that the parties' agreement authorized class-wide arbitration, rejecting the assertion that such a construction was contrary to principles embodied in the Act." Resps. Br. 29 (emphasis added). In their view, *Stolt-Nielsen* thus "stand[s] for the proposition that this Court does not sit to revisit the conclusion that the parties have entered into agreements that ... require that [arbitration] be conducted under certain rules." *Id.*

But that argument raises the question whether respondents have even read *Stolt-Nielsen*. The holding of that case is directly opposite from their description: the Court there *rejected* an arbitration panel's determination that an agreement that was concededly "silent" with respect to classwide arbitration could nonetheless be construed to authorize classwide arbitration. *See* 559 U.S. at 684-87. The *Stolt-Nielsen* Court did not conclude that the arbitration panel had erred in construing the parties' agreement as a matter of *state* law; instead, the arbitrators had overstepped their authority as a matter of *federal* law. As the Court explained, "a party may not be compelled *under the FAA* to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684 (emphasis modified). Needless to say, that holding would be inexplicable if, as respondents assert, the interpretation of an arbitration agreement governed by the FAA were solely a matter of state law.

Respondents' reliance on *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), is equally unavailing. The parties there *agreed* that they had delegated the interpretation of their arbitration

agreement, including the availability of class arbitration, to the arbitrator, and this Court thus reviewed the arbitrator's interpretation of the agreement under the FAA's narrow standard of review of arbitration decisions. *See id.* at 2068-70 & n.2. This case, in contrast, involves a threshold dispute over the enforceability of the parties' arbitration agreement—a dispute for a court, not an arbitrator, to resolve.

Respondents similarly err by asserting that "DIRECTV never articulates anything resembling an administrable legal rule for courts to identify which matters are assigned to [state] law and which are the province of [federal law]." Resps. Br. 19. As noted above, this Court has repeatedly articulated such a rule. In the absence of an agreement to the contrary, state law generally provides the background rules governing contract interpretation, but—with respect to arbitration agreements governed by the FAA—federal law imposes a check on state law. In particular, the FAA establishes a "federal policy favoring arbitration" that requires courts, among other things, to resolve "any doubts" in the interpretation and enforcement of an arbitration agreement "in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mastrobuono*, 514 U.S. at 62; *Volt*, 489 U.S. at 476; *cf. CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 675 (2012) (Sotomayor, J., joined by Kagan, J., concurring in judgment) ("[W]e resolve doubts in favor of arbitration."). In the absence of such federal substantive arbitration law—as this case vividly illustrates—courts could invoke state law to defeat federal arbitration rights at will. *See, e.g., Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*) (state court's

suggestion that enforcement of arbitration agreement governed by FAA "is purely a matter of state law for state-court determination" provides "all the more reason for this Court to assert jurisdiction").

Respondents' "slippery slope" argument is thus baseless. According to respondents, "DIRECTV's suggestion that only extreme misinterpretations of arbitration provisions need be corrected would still require the federal courts to examine and overturn the Contract's established meaning under state law." Resps. Br. 6-7. As noted above, it has long been settled that the FAA creates federal substantive arbitration law that preempts state law inconsistent with the federal policy favoring arbitration. In (presumably rare) cases, like this one, where courts ignore the federal policy favoring arbitration and construe any doubts against arbitration, this Court unquestionably has the authority under the FAA to vindicate federal arbitration rights.

Indeed, respondents' position that the interpretation of an arbitration agreement governed by the FAA is invariably a matter of state law alone conflicts with their recognition elsewhere that that the FAA "freely permits parties to shape their own arbitration agreements." Resps. Br. 1; *see also id.* at 7 (recognizing "[t]he core principle under the Act ... that the parties' own agreements will be respected.").

Respondents insist, however, that the parties here agreed that state law alone would govern the interpretation of their arbitration agreement. *See* Resps. Br. 6-7, 17-24. In their view, the contractual choice-of-law provision (Section 10) mandates the application of state law to govern the interpretation

of the arbitration provision (Section 9). *See, e.g.*, *id.* at 18 ("Here, the Contract provides, with respect to California customers like respondents, that it will be interpreted according to California law."); *id.* at 30 ("[T]he choice-of-law provision ... incorporates California law.").

Again, this argument raises the question whether respondents have even read the relevant provisions. Far from mandating the application of state law to the arbitration provision, the choice-of-law provision does precisely the opposite. As a general matter, it specifies that "[t]he interpretation and enforcement of this Agreement shall be governed by [1] the rules and regulations of the Federal Communications Commission, [2] other applicable federal laws, and [3] the laws of the state and local area where Service is provided to you." 2007 Customer Agreement § 10(b), JA129. And, as relevant here, it then proceeds to specify that "*[n]otwithstanding the foregoing*, Section 9 [the arbitration provision] shall be governed by the Federal Arbitration Act." *Id.* (emphasis added). How respondents can draw from this provision the proposition that "Section 10's choice-of-law provision requires interpreting the agreement under California law," so that the parties agreed that "California law determines what constitutes the 'law of the [customer's] state" in the arbitration provision, Resps. Br. 6, is a mystery.

While it is thus true, as respondents observe, that "[i]t is not possible to interpret the agreement correctly while ignoring the body of law that the parties chose to direct its interpretation," *id.* at 18, that observation cuts decisively against respondents. The parties here went out of their way, as a

contractual matter, to specify that their arbitration agreement "shall be governed by the Federal Arbitration Act." 2007 Customer Agreement § 10(b), JA129. Thus, even if the FAA did not govern this dispute as a statutory matter (which it does, *see* DIRECTV Br. 14), it unquestionably governs this dispute as a contractual matter.

For this reason, respondents' unsubtle pitch for Justice Thomas' vote is misguided. *See* Resps. Br. 27 ("[R]espondents ask that Justice Thomas adhere to his view that the [FAA] does not apply to cases, like this one, that originate in state court and raise state law claims."). As a threshold matter, respondents have never argued at *any* stage of these proceedings—either in the courts below or in their opposition to the petition—that the FAA does not apply in state court, and thus are in no position to challenge this Court's clear precedent holding the FAA applicable in state court. *See, e.g.*, S. Ct. R. 15.2; *Granite Rock Co. v. International B'hood of Teamsters*, 561 U.S. 287, 306 (2010).[1] In addition, Justice Thomas has joined this Court's three most recent decisions applying the FAA to overturn a state court's refusal to enforce federal arbitration rights. *See Nitro-Lift Techs.*, 133 S. Ct. at 503; *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (*per curiam*); *KPMG LLP v. Cocchi*, 132

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[1] Moreover, there is no basis for questioning a precedent that this Court has specifically and repeatedly reaffirmed. *See, e.g.*, *Preston*, 552 U.S. at 353 n.2; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-72 (1995); *cf. Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) ("[S]tate courts have a prominent role to play as enforcers of agreements to arbitrate.").

S. Ct. 23, 24 (2011) (*per curiam*). Finally, neither Justice Thomas nor any other Member of this Court has ever questioned the authority of contracting parties to specify that the FAA governs their arbitration agreement, regardless of the forum in which that agreement is litigated. *See, e.g.*, *Rodriguez v. American Techs., Inc.*, 39 Cal. Rptr. 3d 437, 445 (Cal. Ct. App. 2006) (enforcing parties' agreement to apply FAA § 3, a procedural provision that may not apply of its own force in state court); *cf. Volt*, 489 U.S. at 477 n.6 (reserving question whether FAA § 3 applies of its own force in state court). Accordingly, even if the FAA did not govern here of its own force, it plainly governs here by virtue of the parties' agreement.

In yet another unsubtle pitch for votes, respondents devote an entire subsection of their brief to rebutting what they characterize as "DIRECTV's argument ... that the Act preempts California's prohibition on class action waivers, *even when (as in this case) the parties themselves agree to be bound by that state law rule.*" Resps. Br. 24 (emphasis added); *see generally id.* at 24-28. According to respondents, DIRECTV is thereby attempting "to extend" *Concepcion* in this case, and "the members of the Court who dissented in *Concepcion*" should reject DIRECTV's position. *Id.* at 27 (referencing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

That argument is a red herring. *Concepcion* involved the entirely different question "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Concepcion*, 131 S. Ct. at 1744. This Court answered

that question in the affirmative, and respondents do not challenge that holding here. *See* Resps. Br. 7 (acknowledging that it "is true" that the FAA "preempts a state from requiring the parties to litigate as a class"); *cf. Sanchez v. Valencia Holding Co.*, __ P.3d __, 2015 WL 4605381, at *15 (Cal. Aug. 3, 2015) (holding, contrary to the suggestion of several of respondents' *amici*, that the FAA preempts the prohibition on class action waivers in California's Consumers Legal Remedies Act).

In contrast, as DIRECTV explained in the first line of its opening brief, "[t]his case involves the interpretation of an arbitration agreement." DIRECTV Br. 1. Contrary to respondents' assertion, DIRECTV has never argued that, if indeed the parties here had agreed that the enforceability of their arbitration agreement would turn on state law preempted by the FAA, that statute would nonetheless preclude enforcement of that agreement. To the contrary, DIRECTV acknowledged that "[c]ontracting parties can always choose ... to bind themselves by reference to state law that has been 'nullified' by federal law, just as they can choose to bind themselves by reference to the rules of a board game." *Id.* at 20. The point here is that it would be "nonsensical" to interpret their agreement that way, *Murphy*, 724 F.3d at 1226, and the FAA does not permit courts to choose a nonsensical contract interpretation over one that favors arbitration. On that score, there was no disagreement among the Members of this Court in *Concepcion* (or any other case).

II. The Court Below Erred By Refusing To Enforce The Parties' Arbitration Agreement.

Once it is clear that the FAA neither requires nor permits this Court to rubber-stamp the California Court of Appeal's interpretation of the parties' arbitration agreement, the only question is whether that court faithfully applied the "federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, by "'giv[ing] effect to the contractual rights and expectations of the parties,'" *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt*, 489 U.S. at 479), and resolving "any doubts" in favor of arbitration, *Moses H. Cone*, 460 U.S. at 24. The answer to that question is plainly "no."

Contrary to respondents' assertion, the parties here did not "incorporate into their agreement California's state-law prohibition on class action waivers." Resps. Br. 17. They did just the opposite: they agreed to a class-action waiver so that any arbitration would proceed on an individual basis. *See* 2007 Customer Agreement § 9(c), JA128-29. Indeed, to underscore their *rejection* of state-law prohibitions on class-action waivers, they specified that their entire arbitration agreement would be "unenforceable" if a state-law prohibition on class-action waivers would apply. *Id.* And they further specified that their arbitration agreement "shall be governed by the Federal Arbitration Act." *Id.* § 10(b), JA129. In this context, as the Ninth Circuit has explained, it is "nonsensical" to suggest that the parties intended the reference to "the law of your state" in the arbitration provision to refer to a state-law prohibition on class-action waivers preempted by the FAA. *Murphy*, 724 F.3d at 1226.

The California Court of Appeal, however, declared that the parties' contract did not provide an "explicit" answer to the interpretive question presented. Pet. App. 8. According to that court, the contractual phrase "the law of your state" could refer to *actual* state law subject to the ordinary preemptive force of federal law or *hypothetical* state law immune from the ordinary preemptive force of federal law. *See id.* In deciding which of those alternatives to choose—one of which would render the parties' arbitration agreement unenforceable, the other of which would not—the court did not mention, much less apply, the federal policy favoring arbitration.

Instead, the court relied primarily on the maxim that "when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." Pet. App. 8-9a (internal quotation omitted). The court held that the reference to "the law of your state" in the arbitration provision operates as a specific exception to the general rule that the arbitration provision is governed by the FAA. *See* Pet. App. 9a. But that interpretation, as DIRECTV pointed out in its opening brief, *see* DIRECTV Br. 21, begs the question: the maxim that the specific trumps the general applies only in the event of inconsistency, and there is no inconsistency here *unless* "the law of your state" is interpreted in a highly unorthodox and idiosyncratic manner—*i.e.*, to refer to "the law of your state" immune from the ordinary preemptive force of federal law. Ironically, thus, the Court of

Appeal invoked a maxim used to *resolve* inconsistency to *create* inconsistency.[2]

Respondents offer not a word in defense of the state court's interpretation on this score. Rather, they simply assert that, "as the California Court of Appeal concluded, the more specific incorporation of the 'law of [the customer's] state' controls over the general application of the Act." Resps. Br. 30. But that is a *description*, not a *defense*, of the court's holding.

The other ground on which the Court of Appeal sought to justify its interpretation of the parties' arbitration agreement was to invoke "'the common-law rule ... that a court should construe ambiguous language against the interest of the party that drafted it.'" Pet. App. 10a (quoting *Mastrobuono*, 514 U.S. at 62). But that maxim, as DIRECTV explained in its opening brief, is a tool to *resolve* ambiguity, not to *create* ambiguity, and thus presupposes that the contract is ambiguous in the first place. *See* DIRECTV Br. 22. Here, there is no ambiguity.

Once again, respondents offer not a word in defense of the state court's interpretation on this score. Rather, they simply assert that, "for the reasons given by the California Court of Appeal, the contract is at the very least ambiguous." Resps. Br.

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[2] As *amici* point out, the California Court of Appeal's interpretation of "the law of your state" is also inconsistent with the California courts' previous interpretation of such contractual language, and provides additional support for the conclusion that the lower court's decision violates Section 2 of the FAA. *See Amicus* Br. of U.S. Chamber *et al.* at 6-12.

29 (emphasis omitted). Once again, that is a *description*, not a *defense*, of the court's holding.

Nor, contrary to respondents' assertion, has this Court "recognized" that "ambiguity is properly resolved against ... the party that drafted" an arbitration agreement. *Id.* at 29-30 (citing *Mastrobuono*, 514 U.S. at 62-63). To the contrary, *Mastrobuono* reaffirmed the settled rule that, as a matter of federal substantive arbitration law, "'ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.'" 514 U.S. at 62 (quoting *Volt*, 489 U.S. at 476). In *Mastrobuono*, application of that settled rule cut the same way as application of the maxim of construing contracts against the drafter—the drafter in that case was the one seeking to limit arbitration rights. *See id.* at 58-63. As DIRECTV noted in its opening brief, where these two interpretive principles are in tension, the FAA's "'strong presumption in favor of arbitration'" prevails. DIRECTV Br. 23 (quoting *Huffman v. Hilltop Cos.*, 747 F.3d 391, 396-97 (6th Cir. 2014)). Yet again, respondents offer no response.

Because respondents are unable to defend the Court of Appeal's decision on its own terms, they advance a number of additional arguments. These arguments are equally unavailing.

First, respondents argue that the phrase "the law of your state" refers to state law in existence at a given moment in time, although respondents do not specify when that moment is. *See* Resps. Br. 31-33. Rather, they suggest that the moment might be "(1) when respondents terminated their DIRECTV services; (2) when DIRECTV imposed the fees giving

rise to respondents' state law claims; and (3) when respondents initiated this action." *Id.* at 3; *see also id.* at 31. They are forced to speculate as to these various moments, because their theory has no basis whatsoever in the parties' agreement.

To the contrary, the agreement specifies that the parties will arbitrate their disputes unless "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable," in which event the entire arbitration agreement would be unenforceable. 2007 Customer Agreement § 9(c), JA128-29. It does not refer to "the law of your state" at any given moment, or suggest that state law is frozen in time and impervious to subsequent developments. In the absence of any such limitation, there is no basis to make one up. In particular, there is no basis to conclude that the parties intended "the law of your state" to refer to *inoperative* law (*e.g.*, law that has been preempted, overruled, or repealed), and indeed inoperative law is no longer "law" at all. *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (state law preempted by federal law is "without effect"); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (state law preempted by federal law is "nullified").

Nor is there any merit to respondents' argument that the contract must have referred to state law frozen at a given moment in time because, otherwise, the parties' arbitration agreement might be triggered "in the middle (or even near the end) of litigating the dispute." Resps. Br. 32. Respondents note in this regard that DIRECTV did not seek to compel arbitration here until, more than two years into this litigation, this Court decided *Concepcion*. *See id.*

But this argument has nothing to do with the language of the parties' arbitration agreement. Rather, it is a variation on the waiver argument that respondents made (but on which they did not prevail) below, and which they have never made in this Court. And there is good reason that they do not make a waiver argument: consistent with federal substantive arbitration law (which governs "an allegation of waiver," *Moses H. Cone*, 460 U.S. at 25), parties need not bring futile motions to compel arbitration to preserve their arbitration rights. *See, e.g.*, *Ackerberg v. Johnson*, 892 F.2d 1328, 1332-33 (8th Cir. 1989); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694-97 (9th Cir. 1986); *see also Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 143-45 (Cal. 2014).

Second, respondents argue that "[o]rdinary usage," and the parties' agreement here, distinguishes state from federal law. *See* Resps. Br. 33-34. But DIRECTV does not suggest that there is no difference between state and federal law. Rather, the point here is that there is no reason to suppose that the parties' reference to "the law of your state" means hypothetical state law immune from the ordinary preemptive force of federal law, and the federal policy favoring arbitration does not allow such an unlikely interpretation. Indeed, respondents cite no case in the history of American law holding that a contractual reference to state law signifies the parties' intent to abide by state law preempted by federal law.

And *third*, respondents argue that unless the contractual reference to "the law of your state" encompasses state law preempted by federal law, the

reference to "the law of your state" would be "surplusage," because "no state law triggers its provisions." Resps. Br. 35. But that argument assumes clairvoyance by contracting parties before *Concepcion*. At that time, it was not clear that the FAA preempted state law purporting to invalidate class-action waivers in arbitration agreements. Thus, it was entirely prudent for parties who wanted to ensure that they would not be forced into class arbitration to specify that their arbitration agreement would not be enforceable if state law would invalidate a class-action waiver. And just because subsequent legal developments make it unlikely that the proviso will be triggered does not render that provision "surplusage" such that it should be twisted to mean something other than what it says.

III. Respondents' Arguments In Favor Of Dismissal Are Unavailing.

Finally, in an apparent show of desperation, respondents urge this Court to dismiss the writ as improvidently granted. *See* Resps. Br. 39-45. But they do little more than rehash the arguments they made (unsuccessfully) in opposing the petition for certiorari in the first place. Those arguments did not work then, and they do not work now.

First, respondents argue, as they did in opposing the petition, *see* Pet. Opp. 8, that this case does not involve the interpretation of an arbitration agreement, but instead "the antecedent question whether the parties entered into an arbitration agreement at all," Resps. Br. 39; *see also id.* at 10 ("[T]he lower court concluded that the parties had

not entered into an agreement to arbitrate their disputes in the first place.").

That argument, as DIRECTV explained in its reply to respondents' brief in opposition, is "mystifying." Pet. Reply 4. There is no question that the parties entered into an arbitration agreement, and the California Court of Appeal never "concluded" otherwise. Resps. Br. 10. The parties' agreement specifies that "[i]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved *only* by binding arbitration." 2007 Customer Agreement § 9(b), JA128 (emphasis added). Although the court below declined to enforce this arbitration agreement, it never denied its existence. Rather, the court held that "*under the terms of the parties' arbitration agreement*, the motion [to compel arbitration] was correctly denied." Pet. App. 3a (emphasis added). Indeed, respondents themselves never denied below that they had entered into an arbitration agreement with DIRECTV. *See, e.g.*, Pet. App. 6a. And even now, respondents "agree" with DIRECTV that "the parties entered into an arbitration agreement, which is governed by the [FAA]." Resps. Br. 17.

Insofar as respondents mean to argue that if the parties' arbitration agreement is not *enforceable*, then it does not *exist*, that argument is a legal and logical *non sequitur*. As this Court has explained, "[t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye*, 546 U.S. at 444 n.1; *see also Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70 n.2 (2010). There is no dispute here that the parties "formed an

agreement 'to settle by arbitration a controversy thereafter arising out of their contract,'" Resps. Br. 41 (quoting 9 U.S.C. § 2; emphasis omitted); the only dispute is whether, by its terms, that arbitration agreement is "unenforceable," 2007 Customer Agreement § 9(c), JA129. And that is the question presented by this case, not a reason to dismiss the writ.

Second, respondents argue—as they did in opposing the petition, *see* Pet. Opp. i, 3, 5-10—that this case presents only a question of state law. "The California Court of Appeal's definitive construction of the Contract under state law is controlling and therefore eliminates any conflict with the Ninth Circuit's previous interpretation of the Contract." Resps. Br. 10; *see also id.* at 43.

But that argument—in addition to wholly mischaracterizing the Ninth Circuit's analysis, which rested on the federal principles presented here, *see Murphy*, 724 F.3d at 1225-28—is just a restatement of respondents' merits argument that the interpretation of an arbitration agreement governed by the FAA is *entirely* a matter of state law. As DIRECTV has repeatedly explained, *see* Pet. Reply 1, 3-12; DIRECTV Br. 11-14; *supra* Section I, that argument is plainly incorrect, and at the very least presents a federal question under the FAA. Respondents' conviction that they are correct on the merits, in addition to being ill-founded, provides no reason to dismiss the writ.

Finally, respondents suggest that this Court lacks jurisdiction over this case under 28 U.S.C. § 1257(a), because "that statute applies to 'final' judgments, whereas the Court of Appeal's judgment in this case

is interlocutory." Resps. Br. 45. Respondents raised a similar suggestion in opposing the petition, urging this Court to "deny review of the issues presented herein until a final judgment." Pet. Opp. 4. But, as DIRECTV pointed out in reply, this Court has long recognized that the denial of a motion to compel arbitration in state court is a "final" decision reviewable by this Court under 28 U.S.C. § 1257. *See* Pet. Reply 8 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984)); *see also Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987). Because respondents do not even challenge this rule, it certainly provides no basis to dismiss the writ.

On a related note, respondents complain that DIRECTV's petition for certiorari did not "specify when, in all the lower courts, 'the federal questions sought to be reviewed were raised.'" Resps. Br. 44 (quoting S. Ct. R. 14(g)(i)). As a threshold matter, the time is long past for respondents to raise a procedural challenge to the petition for certiorari; they had their chance to do so in their opposition to that petition. *See, e.g.*, S. Ct. R. 15.2; *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Respondents candidly acknowledge that they "did not raise this argument in the brief in opposition," Resps. Br. 45, which means it is waived. In any event, on the merits, respondents' suggestion that DIRECTV did not rely on federal law in seeking to compel arbitration in the state courts below, *see id.* at 44-45, is simply false. To the contrary, DIRECTV based its motion to compel arbitration on the argument that "plaintiffs entered into valid and enforceable arbitration agreements with DIRECTV, and *the FAA* requires that they be enforced as written," Mem. in Support of Mot. to Compel Arbitration (5/17/11), at 8

(argument heading) (emphasis added; capitalization modified), and invoked federal law at every subsequent stage of those proceedings.

It is similarly disingenuous for respondents to suggest, by citing snippets from the record that predate *Concepcion*, that DIRECTV conceded below that "state law controls" the meaning of "the law of your state" in the arbitration provision. Resps. Br. 45; *see also id.* at 3-4, 19, 23-24, 31. Prior to *Concepcion*, it was entirely reasonable to believe that California law precluded enforcement of the parties' arbitration agreement, and (as noted above) it would have been futile for DIRECTV to argue otherwise. *See, e.g., Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006). *Concepcion* made clear that the FAA preempts California law in this regard, which is why DIRECTV moved to compel arbitration promptly after *Concepcion*. DIRECTV has maintained at every stage of these proceedings that the FAA governs the parties' arbitration agreement, preempts "the law of your state" insofar as such law would deny effect to a class action waiver, and "reflects a strong policy favoring arbitration of disputes." Mem. in Support of Mot. to Compel Arbitration (5/17/11), at 8.

* * *

The FAA requires courts, as a matter of federal substantive law, to enforce arbitration agreements according to their terms and resolve any doubts in favor of arbitration. The court below did just the opposite: it adopted a nonsensical interpretation of the parties' agreement that thwarted their federal arbitration rights. This Court need not and must not tolerate such defiance of federal law.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

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No. 14-462

IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

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RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents desperately want to keep this Court from reaching the merits of this case. After unsuccessfully opposing the petition, *see* Pet. Opp. 3-22, they urged the Court in their merits brief to dismiss the writ as improvidently granted, *see* Resps. Br. 39-45. And now they have filed a Supplemental Brief once again declaring that the case "does not merit this Court's attention," and asking the Court to dismiss the writ. Supp. Br. 4.

At the outset, this argument has no place in a Supplemental Brief, which is "restricted" to presenting this Court with "new matter." S. Ct. R. 25.6. Respondents' fig-leaf for renewing their call for this Court to dismiss the writ is the California Supreme Court's recent decision in *Sanchez v. Valencia Holding Co.*, __ P.3d __, 2015 WL 4605381 (Cal. Aug. 3, 2015). According to respondents, "the ruling in *Sanchez* tracks respondents' position precisely." Supp. Br. 2.

Their only support for that assertion, however, consists of an attempt to *distinguish Sanchez*. In that case, the California Supreme Court reversed a ruling, like the ruling below, that refused to enforce an arbitration agreement governed by the Federal Arbitration Act (FAA). As DIRECTV noted in its reply brief, the *Sanchez* court rejected the argument that the anti-waiver provision in California's Consumers Legal Remedies Act, Cal. Civ. Code § 1751, renders unenforceable class-action waivers in arbitration agreements governed by the FAA. *See* Reply Br. 12 (citing 2015 WL 4605381, at *15). Respondents do not dispute that point.

Rather, respondents accuse DIRECTV of providing a "substantially incomplete" description of *Sanchez* in its reply brief. Supp. Br. 1. That accusation is baseless. The arbitration agreement in *Sanchez*, like the arbitration agreement here, contained a non-severability provision specifying that the arbitration agreement as a whole would be unenforceable if the class-action waiver were unenforceable. But, in sharp contrast to the court below, the *Sanchez* court did not rely on that provision to invalidate the arbitration agreement. To the contrary, the *Sanchez* court recognized that the purpose of such a provision is "to permit the parties to choose class litigation over class arbitration in the event that the class waiver turns out to be legally invalid," and held that the provision there was not triggered when a lower court *erroneously* concluded that a class-action waiver was unenforceable but that error was corrected on appeal. 2015 WL 4605381, at *15.

Respondents insist that the non-severability provision at issue in *Sanchez* "differs critically" from the non-severability provision at issue here. Supp. Br. 2. But that assertion proves at most that *Sanchez* sheds no light on this case. Thus, respondents' reliance on *Sanchez* is unavailing.*

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* Similarly unavailing is respondents' reliance on *Chorley Enters., Inc. v. Dickey's Barbecue Restaurants, Inc.*, __ F.3d __, 2015 WL 4637967 (4th Cir. Aug. 5, 2015). *See* Supp. Br. 2 n.1. That case simply recites the general rule that arbitration is a matter of contract, and the FAA "does not prevent private parties from agreeing to litigate, rather than arbitrate, specific claims." 2015 WL 4637967, at *12. DIRECTV has never

At bottom, respondents' repeated efforts to dodge review of this case only underscore that such review is warranted. Respondents' own filings (as well as the numerous *amicus* briefs supporting each side) confirm that the case presents important and recurring issues about the interplay of federal and state law in the interpretation and enforcement of arbitration agreements. And, at an even deeper level, this case is important because the decision below reflects the "judicial hostility to arbitration," *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2011), that prompted the FAA in the first place. Accordingly, this case once again calls upon this Court to vindicate federal arbitration rights and the supremacy of federal law.

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disputed, and indeed has specifically endorsed, that rule. *See generally* Reply Br. 11-12.

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RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents submit this supplemental brief to address the California Supreme Court's decision in *Sanchez v. Valencia Holding Co., LLC*, 2015 Cal. LEXIS 5292 (Cal. Aug. 3, 2015) (*Sanchez*). Petitioner's Reply Brief acknowledges *Sanchez*, but cites it only in a parenthetical with a "*cf.*," describing the decision as merely holding that the Federal Arbitration Act (Act) "preempts the prohibition on class action waivers in California's Consumer Legal Remedies Act." Reply Br. 12. That characterization is substantially incomplete.

The parties in *Sanchez* entered into an arbitration agreement governed by California law. The agreement contained a class-action waiver, accompanied by a non-severability clause providing: "If a waiver of class action rights is *deemed or found unenforceable* for any reason . ., the remainder of this Arbitration Clause shall be unenforceable" (emphasis added). A California statute prohibits class action waivers. The plaintiffs accordingly argued that the waiver was unenforceable, rendering the arbitration agreement in turn unenforceable under the contract.

The Court in *Sanchez* applied *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), to hold that the Act preempts the state law prohibition on class action waivers. In turn, *Sanchez* rejected the plaintiffs' argument that the arbitration agreement was unenforceable. Interpreting the specific language of the non-severability clause, the Court concluded: "Rather, the provision is most reasonably interpreted to permit the parties to choose class litigation over class arbitration in the event that the class waiver *turns out to be legally invalid*." 2015 Cal. LEXIS 5292, at *42-*43 (emphasis added). The Court ruled that the

class action waiver was not "legally invalid" because the relevant state law was preempted under *Concepcion*. Accordingly, the non-severability clause was not triggered and the arbitration provision was enforceable under the terms of the parties' contract. *Id.*[1]

The ruling in *Sanchez* tracks respondents' position precisely. As in *Sanchez*, the contract in this case (in Section 9) contains an arbitration provision and a class action waiver. Also as in *Sanchez*, the agreement contains a non-severability clause. But the language of the clause in this case differs critically from the provision in *Sanchez*. The clause states: "If, however, *the law of your state would find* this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable" (emphasis added). Interpreting that language, the California Court of Appeal held that the determination of what "the law of your state would find" – as opposed to whether the waiver would be "deemed or found enforceable" – looks to the

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[1] Moreover, it did so as a matter of state contract interpretation – not, as petitioner would have it, based on any presumption in favor of arbitration imposed by the Act. *See also Chorley v. Dickey's Barbeque Restaurants, Inc.*, 2015 U.S. App. LEXIS 13652 (4th Cir. Aug. 5, 2015) (intervening Fourth Circuit ruling: Contractual provision at issue "is not a *state law* prohibiting arbitration. Rather, it is a *contractual provision* prohibiting arbitration. And it is generally well-settled that when a 'party to a contract voluntarily assumes an obligation to proceed under certain state laws, traditional preemption doctrine does not apply to shield a party from liability for breach of that agreement." (citation omitted)).

requirements of California law without the preemptive effect of the Act. Because that California law prohibits class action waivers, the Court of Appeal held that Section 9's arbitration provision was unenforceable pursuant to the contract's own terms.

The ruling in *Sanchez* also supports respondents' view that the appropriate disposition may be to dismiss the petition as improvidently granted. If this case had any ongoing significance before *Sanchez*, it no longer does. Petitioner's contention that the California courts are seeking to avoid this Court's ruling in *Concepcion* lacked merit to begin with, and is now demonstrably false.

Further, respondents' Opening Brief explained – and petitioner notably does not dispute – that the non-severability clause at issue in this case is distinct and virtually unique. It is not employed by any other Fortune 500 company, or even by petitioner any longer. Rather, petitioner and other companies frequently use language like that employed in *Sanchez* that refers more generally to whether a court would deem the class action waiver to be invalid – a question that accounts for whether the court would deem the Act to preempt a state law prohibition on such a waiver. Respondents' opening brief explained that in cases arising from such contract language, an arbitration agreement is enforceable. *See* Br. 35-37.

The California Supreme Court held just that in *Sanchez*, under which the arbitration agreements of every other substantial company – and now even petitioner – are enforceable. The contrary result in this case owes purely to petitioner's own choice – for a brief period – to employ distinct language that turns on what "the law of [the customer's] state would find."

An inferior California court's construction of this unique language under state law does not merit this Court's attention. Moreover, as respondents' brief explained, Br. 43-44, non-severability clauses have essentially no prospective significance because under this Court's recent precedents companies can expressly prohibit class action arbitration (*Concepcion, supra*) or achieve the same result by not discussing the issue at all (*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)).[2]

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[2] Respondents apologize for an error in their opening brief, which states: "in *Stolt-Nielsen*, the Court refused to override an arbitrator's determination that the parties' agreement authorized class-wide arbitration, rejecting the assertion that such a construction was contrary to principles embodied in the Act." Br. 29. The sentence should have referred to *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), not *Stolt-Nielsen*.

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BRIEF OF ARBITRATION AND CONTRACTS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Under the FAA, the Question of Whether the Parties Formed an Agreement to Arbitrate This Dispute Is a Question of State Law 4

II. This Court Has Previously Rejected Efforts to Replace State Contract Law With Federal Common Law Simply Because the Dispute Involves an Arbitration Clause 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co.,
470 F. App'x 652 (9th Cir. 2012) 9

Arthur Anderson LLP v. Carlisle,
556 U.S. 624 (2009) 5, 8

AT&T Technologies, Inc. v. Communications Workers,
475 U.S. 643 (1986) 5

Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.,
748 F.3d 249 (5th Cir. 2014) 9

First Options of Chicago v. Kaplan,
514 U.S. 938 (1995) 4, 5, 6, 7

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 4

Granite Rock Co. v. Int'l Bhd. of Teamsters,
561 U.S. 287 (2010) 7

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,
206 F.3d 411 (4th Cir. 2000) 9

Mundi v. Union Sec. Life Ins. Co.,
555 F.3d 1042 (9th Cir. 2009) 10

Lawson v. Life of the South Ins. Co.
648 F.3d 1166 (11th Cir. 2011) 8, 9

Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford, Jr. Univ.,
489 U.S. 468 (1989) 5, 6

Wash. Mut. Fin. Group, L.L.C. v. Bailey,
364 F.3d 260 (5th Cir. 2004) 9

Statutes

Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* 3

INTEREST OF *AMICI CURIAE*[1]

This case involves a question of substantial importance to the field of arbitration. *Amici* are arbitration and contracts scholars. They file this brief to give the Court the benefit of their many years of scholarly study. In *amici*'s view, both the Federal Arbitration Act and principles of federalism preserve an important role for state courts in applying their own state's contract law to arbitration clauses, just as they do with any other contract. Petitioner's position, if accepted, would result in a federal common law of contracts and would upend this Court's repeated pronouncements that state contract law, rather than federal law, determines whether the parties have entered into a valid agreement to arbitrate. *Amici* include:

Richard Alderman is Professor Emeritus and Director of the Center for Consumer Law at the University of Houston Law Center. Formerly, he was the Dwight Olds Chair in Law, Associate Dean and Interim Dean at the Law Center. Professor Alderman has published and spoken frequently on matters relating to arbitration and alternative dispute resolution, has testified before Congress regarding the Arbitration Fairness Act, and has served as an

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

arbitrator and has often testified in arbitration proceedings.

Lisa Blomgren Amsler is the Keller-Runden Professor of Public Service at Indiana University, where her research focuses on dispute resolution systems. As a former arbitrator, she has handled labor, employment, and sports disputes for the American Arbitration Association and the Federal Mediation and Conciliation Service. She served as a Council Member of the American Bar Association's Section of Dispute Resolution, and as Co-Chair of its Consumer Arbitration Study Group.

Carol Chomsky is Professor of Law at the University of Minnesota Law School, where she has been on the faculty since 1985 and served as Associate Dean for Academic Affairs in 2012-2015. She is the co-author of the casebook *Contracts: A Contemporary Approach* (2d ed. 2013), and the casebook *Learning Sales*. Her scholarship addresses topics in history, contracts law, and pedagogy.

Karen Halverson Cross is Professor of Law at the John Marshall Law School in Chicago. She has written several articles on the law of arbitration, including *Letting the Arbitrator Decide Unconscionability Challenges*, 26 Ohio St. J. on Disp. Res. 1 (2011).

Mark C. Rahdert is a Professor of Law at the Temple University Beasley School of Law. Professor Rahdert specializes in the areas of federal courts and constitutional law.

SUMMARY OF ARGUMENT

This case concerns a state court's interpretation of a contract provision under state law. This is a classic role for state courts to play and something that state courts do all the time. Contract disputes ordinarily present questions of state law that are resolved by state courts applying that law.

Nothing about that paradigm changes simply because a state court is deciding whether the parties formed an agreement to arbitrate rather than deciding any other contractual question. The California Court of Appeal's actions below were perfectly consistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, which enshrines state contract law as the governing law for determining whether the parties to a contract have agreed to arbitrate a particular dispute.

Petitioner seeks to upend these principles by arguing that the California Court of Appeal's application of California law to a California contract somehow violates the FAA because the court, in applying those settled state-law principles, determined that the parties did not enter an agreement to arbitrate. That is incorrect because the FAA incorporates, rather than overrides, state contract law. This Court has previously stopped lower courts and litigants from federalizing questions of state contract law simply because they arise in the context of an arbitration clause, and has reaffirmed the importance of state contract law. Just as in any other contract dispute, state law governs, and this Court should apply state law here.

ARGUMENT

I. Under the FAA, the Question of Whether the Parties Formed an Agreement to Arbitrate this Dispute Is a Question of State Law.

Just as with any other contractual term, state law governs the meaning of an arbitration clause within a contract. This derives from the Act's purpose to treat contracts for arbitration just like any other contract. The Act was adopted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Accordingly, just like any other contract, the question of whether the parties have entered into a valid agreement to arbitrate is governed by state law. More than twenty years ago, this Court enshrined this uncontroversial principle in *First Options of Chicago, Inc. v. Kaplan*, stating: "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts."[2] 514 U.S. 938, 944 (1995).

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[2] The one "qualification" this Court identified is that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Kaplan*, 514 U.S. at 944 (quoting

The Court emphasized that a dispute over arbitration is nothing more than a specific type of contract dispute. It explained that "arbitration is simply a matter of contract between parties; it is a way to resolve disputes—but only those disputes—that the parties have agreed to submit to arbitration." *Id.* More recently, this Court again emphasized that the FAA "does not alter background principles of state contract law" as they apply to arbitration clauses. *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

Thus, while Petitioner and its *amici* vigorously repeat their mantra that the FAA requires courts to "enforce the parties' arbitration agreement according to its terms," *e.g.* Pet'r Br. 11, that is beside the point. Even assuming that statement is true, what those terms mean, and whether they evidence an agreement to arbitrate in the first place, is a matter of state law. Indeed, in *Volt*, this Court refused to second guess the California Court of Appeal's determination as a matter of state contract law that an arbitration provision's choice of law clause incorporated California's arbitration rules that would otherwise be displaced by the FAA. *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 476-79 (1989) (applying the state-court of appeal's interpretation of the choice of law provision and holding that the state-court's interpretation was not preempted).

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986)).

Here, Petitioner may not like the California Court of Appeal's application of its own state law, but that in and of itself does not violate the FAA. Enforcing an arbitration agreement according to its terms is not a mandate for federal courts to override any state-court interpretation of state contract law that does not result in an order compelling arbitration.

Any other reading of the FAA turns arbitration from a consensual process into a coerced one. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Yet, Petitioner's argument that this Court must compel arbitration as a matter of federal law even where a state court determines as a matter of its own state's law that the parties never formed an arbitration agreement would force parties into arbitration when they never agreed to it. This would undermine the FAA's goal of sending to arbitration "only those disputes" that the parties agreed to arbitrate. *Kaplan*, 514 U.S. at 944.

That state contract law determines whether the parties' dispute must be sent to arbitration is especially evident given that the issue here is whether a valid arbitration agreement was formed in the first place. As Respondents have detailed, the customer service agreement provides for arbitration only where the "law of your state" would permit arbitration. Resp. Br. 40-43. In other words, while there is no dispute that the contract contains an arbitration *clause* that sets the conditions under which the parties will have been deemed to have

entered an agreement to arbitrate, there is no *agreement* to arbitrate because the pre-requisite to such an agreement—that it would be allowed by "the law of your state"—is absent. *Id.*

As already explained, *Kaplan* establishes that formation questions are resolved according to "ordinary state law principles that govern the formation of contracts" generally. 514 U.S. at 944. Petitioner tries to circumvent this principle by arguing that this dispute implicates the federal policy favoring arbitration. Pet'r. Br. 12-13. But the federal policy favoring arbitration does not apply to the antecedent question of whether the parties entered an agreement to arbitrate in the first place. Thus, this Court recently declined to apply any federal policy regarding arbitration to the question of when a collective bargaining agreement "that contains the parties' arbitration clause was ratified and thereby formed." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) (footnote omitted). It explained that "we have never held that the policy overrides the principle that a court may submit to arbitration 'only those disputes that the parties have agreed to submit.'" *Id.* at 302 (quoting *Kaplan*, 514 U.S. at 943). Rather, this Court has only applied the federal policy "where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed ." *Id.* at 303. Accordingly, the federal policy is inapplicable here, and state law controls.

II. This Court Has Previously Rejected Efforts to Replace State Contract Law With Federal Common Law Simply Because the Dispute Involves an Arbitration Clause.

Petitioner misconstrues the FAA in trying to federalize what is a garden-variety question of state contract law. This is not the first time that parties or courts have improperly tried to read state contract law out of the FAA. This Court has previously put to rest other attempts to use the FAA to turn state-contract law questions into federal issues simply because the case involves an arbitration clause. Many arbitration-related disputes concern whether an arbitration provision can be enforced by, or against, a non-signatory to the contract containing the arbitration provision. *See, e.g., Carlisle*, 556 U.S. at 632 (describing non-signatory's attempts to enforce arbitration clause under the doctrine of equitable estoppel). Just as contract formation questions are addressed by state contract law, states also have developed principles to determine when non-signatories can fall within the reach of an arbitration clause, through such doctrines as estoppel, third-party beneficiary, agency, alter ego and others. *See, e.g., Lawson v. Life of the South Ins. Co.* 648 F.3d 1166, 1171-75 (11th Cir. 2011) (applying Georgia law regarding third-party beneficiary and equitable estoppel in finding that a non-signatory could not enforce an arbitration provision).

Despite the fact that state law principles already in place address non-signatory rights, a number of

federal courts had decided that in the area of arbitration, federal law should determine whether a non-signatory can enforce, or can be bound by, the arbitration provision. *See, e.g., Wash. Mut. Fin. Group, L.L.C. v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (holding that "a court should look to the federal substantive law of arbitrability" to determine a non-signatory's rights and noting that nearly all other federal circuits to address the question have reached the same conclusion); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 n. 4 (4th Cir. 2000) (same).

Subsequently, this Court rejected that approach in *Arthur Andersen v. Carlisle*. 556 U.S. 624 (2009). There, this Court made clear that a non-party to an arbitration provision may enforce it "if the relevant state contract law allows him to enforce the agreement." *Id.* at 632. As a result, lower courts have now acknowledged that their previous attempts to craft a federal common law of contracts for the question of non-signatory rights was improper and that they instead must apply state contract law principles. *See, e.g., Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 255 (5th Cir. 2014) (noting that its prior decisions "applying federal common law, rather than state contract law" to non-signatory questions was incorrect and had been modified to conform with *Carlisle*); *Lawson*, 648 F.3d at 1171 (finding that *Carlisle* established that state law controls whether a non-signatory falls within an arbitration provision, and that any prior decisions applying federal law were abrogated); *see also Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co.*, 470 F. App'x 652, 653 (9th Cir. 2012) (non-

precedential) ("The district court applied our court's decision in *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045-47 (9th Cir. 2009), while under the Supreme Court's decision in [*Carlisle*], the district court should have applied state law, not federal common law.").

In short, not every question concerning the interpretation of an arbitration clause is a question of federal law simply because an arbitration clause is involved. Rather, the question of whether an arbitration clause was validly formed, just like the question of whether any other contract was validly-formed, is governed by state contract law. The California Court of Appeal did exactly what it was supposed to do in applying California contract law to determine if the parties entered into a valid agreement to arbitrate.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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Date: July 24, 2015

No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

BRIEF *AMICI CURIAE* OF ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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June 5, 2015

QUESTION PRESENTED

Whether the California Court of Appeal erred by holding that a reference to state law in an arbitration agreement requires the application of state law preempted by the Federal Arbitration Act when another provision of the agreement specifically provides that the arbitration is governed by the Federal Arbitration Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

CORPORATE DISCLOSURE STATEMENT. . ii

TABLE OF AUTHORITIES..... iv

INTEREST OF *AMICI CURIAE*. 1

PRELIMINARY STATEMENT. 3

SUMMARY OF ARGUMENT. 8

ARGUMENT..... 10

The California Court of Appeal's Decision Is Inconsistent With the Federal Arbitration Act and This Court's Teaching On the Enforceability of Arbitration Agreements.. 10

CONCLUSION..... 23

TABLE OF AUTHORITIES

Page(s)

Cases

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013). 3, 20
AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). *passim*
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). ... 21
Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). 11
Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005). 13
Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S.141, 157 (1982).. 16
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). 9, 10, 22
In re DIRECTV Early Cancellation Fee Mktg. & Sales Practices Litig., 810 F Supp. 2d 1060 (C.D. Cal. 2011). 4, 17
In re H & R Block Refund Anticipation Loan Litigation, 59 F. Supp. 3d 903 (N.D. Ill. 2014). 17
Meyer v. T-Mobile USA Inc., 836 F. Supp. 2d 994 (N.D. Cal. 2011). 17
Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614 (1985). 11
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).. 11
Murphy v. DIRECTV, Inc., 724 F.3d 1218 (9th Cir. 2013). 9, 14, 15, 17, 18

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*). 9, 21
Rent-A-Center, West, Inc. v. Jackson,
561 U.S. 63 (2010). 11
Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994). 9
Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010). 10, 11, 20, 21
Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989). 11, 12

Statutes

9 U.S.C. §§ 1, *et seq.*. 3

Other Materials

Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*,
106 Colum. L. Rev. 1872 (2006). 21
Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*,
71 N.Y.U. L. Rev. 74 (1996).. 21

INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of *amici* in the benefits of arbitration is exemplified by its participation as *amicus* and as counsel for *amici* in *American*

Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

Amici believe that the decision of the California Court of Appeal in this case is inconsistent with the purposes of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") and both the long-standing and recent teaching of this Court regarding arbitration and the effect of the FAA on state law. *Amici* believe that the California court ignored the preemptive effect of federal law. The decision below will deter many companies from incorporating arbitration as a dispute resolution mechanism in their commercial dealings, thus frustrating a fundamental purpose of the FAA.

PRELIMINARY STATEMENT

This case arises from a consumer class action against DIRECTV. Inc., a provider of satellite television services in California and elsewhere, brought by customers who reside in California on behalf of themselves and a class of all other DIRECTV customers in California. (California Complaint, JA53). Plaintiffs allege that DIRECTV engages in a policy and practice of enforcing an alleged contractual obligation against its customers to purchase DIRECTV's services for a specified period of time, typically 18 or 24 months, by imposing an early cancellation penalty on

customers who discontinue receiving DIRECTV's services before the expiration of the term of the Customer Agreement (JA58), and that "[t]he early cancellation penalties bear no relation to the damage, if any, incurred by DIRECTV in connection with an early cancellation of the service." (JA58). Plaintiffs further allege that DIRECTV withdraws the early cancellation penalties and other amounts due directly from customers' bank accounts or credit cards, using account information provided by the customers when they first ordered DIRECTV (JA58).

Plaintiffs sought injunctive relief on behalf of all current and former DIRECTV customers who were charged or may be charged an early cancellation penalty and monetary relief on behalf of current and former DIRECTV customers who paid DIRECTV an early cancellation penalty. (JA59).[2] Plaintiffs subsequently moved for class certification, and the California trial court granted

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[2] The state court litigation proceeded at the same time as a multidistrict litigation proceeding in federal court involving similar claims. *See In re DIRECTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d 1060 (C.D. Cal. 2011). DIRECTV moved to stay plaintiffs' state court action pending the outcome of the multidistrict litigation, but the California state trial court denied the motion. *See* Pet. App. 3a.

the motion in part and denied it in part, certifying a class as to one of plaintiffs' theories but denying certification as to others. (Pet. App. 3a-4a).

The Customer Agreement between DIRECTV and its subscriber sets forth the parties' rights and obligations and explains the terms and conditions of subscribing to DIRECTV services. The Agreement is provided to subscribers at the outset of the relationship. (McCarthy Decl., JA107). Amendments or updates to the Agreement are provided to customers with periodic billing statements. (McCarthy Decl., JA107).

The DIRECTV Customer Agreement contains an arbitration provision that provides "any legal or equitable claim relating to this Agreement, any addendum, or your Service" will first be addressed through an informal process and,

> [I]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated and under the rules set forth in this Agreement.

Customer Agreement § 9(b), JA128; *see also* Pet. App. 4a.

The Agreement also sets out "Special Rules" governing arbitration, including the following:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable.

Customer Agreement § 9(c), JA128-29; *see also* Pet. App. 4a.

Section 10 of the Agreement contains provisions addressing several miscellaneous matters, including the following provision concerning "Applicable Law":

> The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. ***Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.***

Customer Agreement § 10(b), JA141 (emphasis added); *see also* Pet. App. 5a. This case involves the interpretation of that arbitration provision.

After the parties entered into the Customer Agreement with the arbitration provision, this Court held that state law cannot force parties to arbitrate on a classwide basis when they have not agreed to do so. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

Shortly after this Court's decision in *Concepcion*, DIRECTV moved to stay or dismiss plaintiffs' state court action, decertify the class, and compel arbitration of plaintiffs' claims. (Pet. App. 4a). The California Superior Court denied that motion. The California Court of Appeal affirmed, relying on the proviso in the Agreement that stipulates that if the law of the state in which the customer resides would find unenforceable the agreement to dispense with class arbitration procedures, then the entire arbitration agreement will be unenforceable. The California appellate court held that the proviso reflects the parties' intent to rely on state law to nullify the arbitration agreement. The California Supreme Court summarily denied review. (Pet. App. 1a).

SUMMARY OF ARGUMENT

In the Customer Agreement, the parties agreed to resolve their disputes through arbitration, as opposed to litigation, and the parties agreed not to arbitrate on a classwide basis. The parties specifically agreed that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [the dispute resolution provision, including arbitration] shall be unenforceable." Customer Agreement § 9(c), JA128-29.

The decision of the California court below, based on a selective and contorted reading of the Agreement, negates the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. It does not heed this Court's recent teaching on the enforceability of arbitration agreements that "the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms" and to "facilitate streamlined proceedings." *Concepcion*, 131 S.Ct. at 1748. To this end, this Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.*

The California Court of Appeal erroneously failed to give effect to the parties' agreement that

the FAA governs the arbitration provision. The state court also failed to properly give preemptive effect to the FAA as interpreted by this Court in the context of waivers of class arbitration. See *Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994) (explaining that this Court's "construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.")

The court below refused to enforce the arbitration agreement according to its terms, and instead adopted a contorted interpretation that frustrates arbitration.[3] The California appellate court's holding that California law precludes class arbitration misapplies federal arbitration law and exemplifies the very "judicial hostility towards arbitration," which the FAA was intended to foreclose. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

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[3] Reasoning substantially similar to that of the California court has been characterized as "nonsensical," by the Ninth Circuit *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013).

The California Court of Appeal's decision is incompatible with the longstanding principle of federal law, embodied in the FAA, numerous precedents of this Court favoring the validity and enforceability of arbitration agreements, and federal preemption. This Court should reverse the judgment below.

ARGUMENT

I.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge this Court to reverse the California Court of Appeal's decision and to confirm its holdings in *Concepcion*, *Stolt-Nielsen* and other cases, which recognize the overriding Congressional policy favoring arbitration. This Court should make clear that this federal policy cannot be circumvented by contorted readings of contractual arbitration provisions and that lower courts cannot manipulate an arbitration clause to invalidate class arbitration waivers.

This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 131 S. Ct. at 1745 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561

U.S. 63, 67 (2010)); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Information Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (*Volt*), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 131 S. Ct. at 1748. The Court of Appeal's decision frustrates these principles and this Court's teaching that the FAA "embodies [a] national policy favoring arbitration," *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Concepcion*, 131 S. Ct. at 1745. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25 & n.32; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Here, the California Court of Appeal determined that "the parties' entire arbitration agreement is unenforceable, pursuant to the agreement's express terms, because the law of plaintiffs' state would find the class action waiver unenforceable." *See* Pet. App. 6a.

The California court paid lip service to the FAA's broad policy of enforcing arbitration agreements according to their terms, but found that because the parties "agreed to abide by state rules of arbitration, enforcing those rules is fully consistent with the goals of the FAA even if application of the state rules would yield a different result from application of the FAA." Pet. App. 6a-7a (citing *Volt*, 489 U.S. at 478-79) and a number of California state court decisions; other citations and internal quotes omitted).

In the California court's view, *Concepcion* did not hold that the FAA prohibits class arbitration, but only that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*citing Concepcion*, 131 S.Ct. at 1751). Further, the Court of Appeal reasoned that, "if the FAA does not prohibit parties from agreeing to class arbitration itself," then "the FAA presumably does not prohibit them from agreeing that their agreement will be governed by state laws that are less hostile to class arbitration than the FAA." Pet. App. 8a, n.1. The Court of Appeal cited no authority for its presumptive corollary and *amici* submit that it is incorrect, because it ignores the principle of preemption, and violates the overarching purpose of the FAA. It also reads out of the agreement

Section 10, which explicitly states that the FAA governs the interpretation of Section 9.[4] The California court's decision is at odds with contemporaneous federal court interpretations of the very same arbitration provisions.

The California court acknowledged that *Concepcion* held that California law, including its *Discover Bank*[5] rule "is preempted by the FAA" to the extent it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," but then proceeded to create just such an "obstacle" by a tortured interpretation of the Customer Agreement. Pet. App. 10a.

The issue is not as complicated as the California court tried to make it. This Court held in *Concepcion* that the FAA preempts state laws that purport to require class arbitration where the parties have not agreed to it. *See Concepcion*, 131 S. Ct. at 1747-53. By agreeing that the arbitration provision, section 9 of the Customer Agreement, "shall be governed by" the FAA the parties to that

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[4] While the parties could have designated some law or rule other than the FAA to govern their arbitration agreement, they did not. They explicitly invoked the FAA, and there is no valid, nonpreempted, California law that invalidates the waiver of class arbitration.

[5] *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005).

agreement sought to prevent the application of state law inconsistent with the FAA, and not to rely on state law that "'creates a scheme inconsistent with the FAA.'" *Murphy v. DIRECTV, Inc.* 724 F.3d 1218, 1226 (9th Cir. 2013) (*Murphy*) (quoting *Concepcion*, 131 S. Ct. at 1748).

In *Murphy*, the Ninth Circuit decided a similar case concerning the enforceability of the same arbitration provision and class action waiver in DirecTV's customer agreement under *Concepcion*. That court held that "the arbitration agreement is enforceable under *Concepcion*," which preempts any state law to the contrary. 131 S. Ct. at 1228. The court reasoned that "the parties' various contract interpretation arguments" – which included both the argument that the specific reference to state law controlled over the general reference to the FAA and the argument that ambiguities should be construed against the drafter – "are largely irrelevant to our analysis," because under the Supremacy Clause of the United States Constitution, and the related doctrine of federal preemption, federal law *is* the law of every state. *Id.*; *see also* 131 S. Ct. at 1226 ("Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, *is* the law of

California and of every other state.") (emphasis in original); *see generally* 131 S. Ct. at 1225-1228.

The California Court of Appeal acknowledged that its decision conflicts with *Murphy* (Pet. App. 13a), which had characterized reasoning substantially the same as that of the Court of Appeal as "nonsensical." *Murphy*, 724 F.3d at 1226.[6] According to the Court of Appeal, "*Murphy*

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[6] The California Court of Appeal merely said that it found *Murphy* to be "unpersuasive," but its explanation – that a reasonable reader would not understand the phrase "the law of your state," to mean "federal law plus (nonfederal) state law" (*see* Pet. App. 13a) – slights the preemptive force of federal law and the FAA in particular. It also ignores the plain meaning of section 10 of the Customer Agreement.

The California Court of Appeal's criticisms of *Murphy* fail to respond to its central point that state rules preempted by the FAA never were "state law." *Murphy*, 724 F.3d at 1226. The *Murphy* court explained that federal law is part of the law of every state "as much as [every state's] own local laws and Constitution." *Id.* (internal quotation marks omitted), thus providing a basis for concluding that the parties did not intend state law to govern the enforceability of the arbitration clause if the state law contravened federal law. Thus, the *Murphy* court found it "nonsensical" that by agreeing that the "law of their state" would govern the agreement, the parties intended to mean "the law of their state without considering federal law." *Id.*

Contrary to the California court's misapphrension, the *Murphy* court did not "reason[ ] that contract interpretation is irrelevant because the parties are powerless to opt out of the FAA by contract . . " Pet. App. 13a-14a. Rather, the *Murphy* court expressly recognized that "if DirecTV had actually contracted with Plaintiffs to allow class arbitration,

(continued...)

provides no basis for concluding that the parties intended to use the phrase 'the law of your state'" to mean state law subject to the ordinary preemptive force of federal law. Pet. App. 13a. Instead, the Court of Appeal interpreted the phrase "the law of your state" to mean "the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA " Pet. App. 14a (emphasis added).

"The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 (1982) (internal quotation marks omitted). When the Supreme Court holds that a state law is preempted, the state law is "*nullified* to the extent that it actually conflicts with federal law." *Id.* at 153 (emphasis added).

From a constitutional perspective, the FAA "has always preempted states from invalidating agreements that disallow class procedures."

(...continued)
it would be required to do so irrespective of *Concepcion*." *Murphy*, 724 F.3d at 1228. The parties, however, "did exactly the opposite" by agreeing to a class-action waiver. *Id.*

Murphy, 724 F.3d at 1226; *see also In re H & R Block Refund Anticipation Loan Litigation*, 59 F Supp. 3d 903 (N.D. Ill. 2014).

The California Court of Appeal's decision is also inconsistent with a federal district court decision in federal multidistrict litigation "that parallels the instant state court actions" (Pet. App. 12a), *In re DIRECTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d at 1071 (C.D. Cal. 2011), in which the court held that the reference to "the law of your state" in section 9 of the customer agreement could not mean that enforceability of the class action waiver should be determined exclusively under state law, because that would render "meaningless" section 10's general statement that the arbitration agreement is governed by the FAA.

Similarly, the court in *Meyer v. T-Mobile USA Inc.*, 836 F Supp. 2d 994 (N.D. Cal. 2011) reached the same conclusion as the *Murphy* court, holding that "[a]lthough the Supreme Court decided *Concepcion* after Plaintiff entered the 2008 Service Agreement, the Court must nonetheless apply *Concepcion* to its review of the agreement." *Id.* at 1001 ("[A]n intervening Supreme Court decision must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or

postdate announcement of the rule "
(internal quotation marks omitted)).

The California court's convoluted deconstruction of sections 9 and 10 of the Customer Agreement renders nugatory the parties' intent that their arbitration agreement "shall be governed by the [FAA] ." Customer Agreement § 10(b), JA129.

The California Court of Appeal construed the phrase "the law of your state" as though in the context of an arbitration agreement governed by the FAA the law of California was not preempted by federal law. Three federal courts – this Court in *Concepcion*, the Ninth Circuit in *Murphy*, and the District Court for the Central District of California in the *In re DIRECTV* multidistrict litigation, disagree, and so do *amici*.

The California court's decision in this case evinces a strong aversion to parties' rights to contract for individual arbitration and to contract out of class-wide arbitration. In essence, the decision below forces parties to consent to class-wide arbitration or risk invalidation of their agreement to arbitrate rather than litigate. In crafting an arbitration agreement:

> [P]arties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit

> *with whom* a party will arbitrate its disputes.
>
> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.

Concepcion, 131 S. Ct. at 1748-49 (citations omitted, emphasis in original).

Compelled class arbitration defeats the parties' ability to tailor their arbitration agreement and undermines the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. *See Concepcion*, 131 S. Ct. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and creates a scheme inconsistent with the FAA.").

This Court's decision in *Concepcion* rests on the conclusion that "class arbitration" is "not arbitration as envisioned by the FAA," because it lacks the speed and efficiency of individual arbitration, requires the burdens and "formality" of class-action litigation, and "greatly increases risks to defendants" given the magnified stakes and absence of meaningful judicial review. 131 S. Ct. at 1751-1753. Requiring parties who have agreed to arbitrate on an individual basis to arbitrate on

a class-wide basis as well as a precondition to availing themselves of the arbitral forum, this Court held, would "interfere[]" with the FAA's objective of "promot[ing] arbitration." *Concepcion*, 131 S. Ct. at 1749-1750.

Concepcion makes it clear that enforcement of a class arbitration waiver is essential to serve the FAA's mandate of preserving party autonomy in the crafting of informal and expeditious procedures for the private resolution of *individual* disputes. *See Concepcion*, 131 S. Ct. at 1749.[7] "[C]ourts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes' " *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013) (emphasis in original, internal citation omitted); *see also Stolt-Nielsen*, 559 U.S. at 683. There is a

[7] Limited "procedural" challenges to a class action waiver may survive *Concepcion*. *See Concepcion*, 131 S. Ct. at 1750 n.6 ("States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."). This case does not fall within this exception.

fundamental difference between bilateral arbitration and class-action arbitration. *Concepcion*, 131 S. Ct. at 1750; *see also Stolt-Nielsen*, 559 U.S. at 686.[8]

The California court's decision in this case is not a faithful application of federal arbitration law and exhibits the continued "judicial hostility towards arbitration" that the FAA was intended to foreclose, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at

---

[8] "Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes." *Concepcion*, 131 S. Ct. at 1750. This Court has cautioned in the context of judicial class actions, not arbitration, that class actions may exert pressure on defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

One scholarly article states that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 143 (1996); *see also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006) ("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.") The same pressure to settle would be felt if class-wide arbitration were imposed.

1745, 1747, 1757; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Amici urge this Court to instruct state courts once again that they cannot avoid or circumvent the overriding federal policy favoring arbitration or impose conditions on arbitration agreements incompatible with the federal policy favoring efficient arbitration processes by drawing on state law and relying on sophistic reasoning such as that employed by the California court below.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the California courts.

Respectfully submitted,

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No. 14-462

In the Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

–v–

AMY IMBURGIA ET AL.,

Respondents.

On Writ of Certiorari to the
California Court of Appeal, Second District

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. CALIFORNIA COURTS ARE NOT HOSTILE TO ARBITRATION 3

A. California Courts Did Not Discriminate Against Arbitration Before *Concepcion* ... 4

B. California's Recent FAA Jurisprudence Has Also Been Faithful to this Court's Precedents 9

CONCLUSION 15

APPENDIX

List of Amici Curiae California Law Professors 16

TABLE OF AUTHORITIES

Page

CASES

A&M Produce Co. v. FMC Corp.,
186 Cal. Rptr. 114 (Ct. App. 1982) 18

American Express Co. v. Italian Colors Restaurant,
133 S.Ct. 2304 (2013) ..... passim

Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000) ... 10, 11, 12

AT&T Mobility LLC v. Concepcion,
131 S.Ct. 1740 (2011) ..... passim

Berent v. CMH Homes, Inc.,
___S.W.3d___, No. E201301214SCR11CV,
2015 WL 3526984 (Tenn. June 5, 2015) 13

Booker v. Robert Half Int'l, Inc.,
413 F.3d 77 (D.C. Cir. 2005) 6

Brewer v. Missouri Title Loans,
364 S.W.3d 486 (Mo. 2012) 10, 16

Broughton v. Cigna Healthplans of Cal.,
988 P.2d 67 (Cal. 1999) 4, 5

Chavarria v. Ralphs Grocery Co.,
733 F.3d 916 (9th Cir. 2013) 15

Cheek v. United Healthcare of Mid–Atlantic, Inc., 835 A.2d 656 (Md. 2003) 11

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 6

Coady v. Cross Country Bank, Inc.,
729 N.W.2d 732 (Wis. App. 2007) 10

TABLE OF AUTHORITIES—Continued

Page

Coleman v. Prudential Bache Sec., Inc.,
802 F.2d 1350 (11th Cir. 1986) 15

Cooper v. QC Financial Services, Inc.,
503 F. Supp. 2d 1266 (D. Ariz. 2007) 9

Credit Bureau, Inc. v. Cingular Wireless LLC,
379 F.3d 159 (5th Cir. 2004) 12

D.R. Horton Inc. v. Cuda,
357 NLRB No. 184, 2012 WL 36274 (2012) 19

Dale v. Comcast Corp.,
498 F.3d 1216 (11th Cir. 2007) 10

Dan Ryan Builders, Inc. v. Nelson,
737 S.E.2d 550 (W. Va. 2012) 12

Discover Bank v. Superior Court,
113 P.3d 1100 (Cal. 2005) 9, 19

Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1996) 7, 9

Dunlap v. Berger,
567 S.E.2d 265 (W. Va. 2002) 10

E.E.O.C. v. Waffle House, Inc.,
534 U.S. 279 (2002) 6

Feeney v. Dell Inc.,
908 N.E.2d 753 (Mass. 2009) 8, 10

Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC,
306 P.3d 480 (N.M. Ct. App. 2012) 17

Fiser v. Dell Computer Corp.,
188 P.3d 1215 (N.M. 2008) 10

TABLE OF AUTHORITIES—Continued

Page

Gentry v. Superior Court,
165 P.3d 556 (Cal. 2007) 18, 19

Gibson v. Neighborhood Health Clinics, Inc.,
121 F.3d 1126 (7th Cir. 1997) 11

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 6

Guidotti v. Legal Helpers Debt Resolution, L.L.C., ___F. Supp. 3d___ No. CIV.A. 11-1219 JBS, 2014 WL 6863183 (D.N.J. Dec. 3, 2014) 16

Herron v. Century BMW,
693 S.E.2d 394 (S.C. 2010) 10

Hill v. Garda CL Nw., Inc.,
308 P.3d 635 (Wash. 2013) 17

Hull v. Norcom, Inc.,
750 F.2d 1547 (11th Cir. 1985) 12

In re Checking Account Overdraft Litig.,
___F. Supp. 3d___, No. 1:09-MD-02036, 2015 WL 464266 (S.D. Fla. Feb. 3, 2015) 16

In re Poly-Am., L.P.,
262 S.W.3d 337 (Tex. 2008) 8

Independence Cnty. v. City of Clarksville,
386 S.W.3d 395 (Ark. 2012) 11

Iskanian v. CLS Transp. Los Angeles, LLC,
327 P.3d 129, (Cal. 2014) 19

TABLE OF AUTHORITIES—Continued

Page

Jimenez v. Cintas Corp.,
___S.W.3d__, No. ED 101015, 2015 WL 160451 (Mo. Ct. App. Jan. 13, 2015) 11

Kelker v. Geneva-Roth Ventures, Inc.,
303 P.3d 777 (Mont. 2013) 16

Kinkel v. Cingular Wireless LLC,
857 N.E.2d 250 (Ill. 2006) 10

Kristian v. Comcast Corp.,
446 F.3d 25 (1st Cir. 2006) 6

Lazado v. Dale Baker Oldsmobile, Inc.,
91 F.Supp.2d 1087 (W.D. Mich. 2000) 10

Leonard v. Terminix Int'l Co., L.P.,
854 So. 2d 529 (Ala. 2002) 9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 5

Muhammad v. County Bank of Rehoboth Beach, Delaware, 912 A.2d 88 (N.J. 2006) 9

Noohi v. Toll Bros., Inc.,
708 F.3d 599 (4th Cir. 2013) 11

Picardi v. Eighth Judicial District,
251 P.3d 723 (Nev. 2011) 8

Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC,
282 P.3d 1217 (Cal. 2012) 19, 20

Powertel v. Bexley,
743 So. 2d 570 (Fla. Ct. App. 1999) 9

TABLE OF AUTHORITIES—Continued

Page

Rembert v. Ryan's Family Steak Houses, Inc.,
596 N.W.2d 208 (Mich. 1999) 7

Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) 6

Schnuerle v. Insight Comm, Co., L.P.,
376 S.W.3d 561 (Ky. 2012) 16

Scott v. Cingular Wireless,
161 P.3d 1000 (Wash. 2007) 9

Sec. Serv. Fed. Credit Union v. Sanders,
264 S.W.3d 292 (Tex. App. 2008) 7

Shearson/Am. Exp., Inc. v. McMahon,
482 U.S. 220 (1987) 5, 6

Siopes v. Kaiser Found. Health Plan, Inc.,
312 P.3d 869 (Haw. 2013) 16

Smith v. Jem Grp., Inc.,
737 F.3d 636 (9th Cir. 2013) 16

Sonic Calabasas A, Inc. v. Moreno,
311 P.3d 184 (Cal. 2013) 17, 18

Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Management, Inc.,
795 P.2d 1308 (Az. Ct. App. 1990) 11

THI of N. M. at Hobbs Ctr., LLC v. Patton,
741 F.3d 1162 (10th Cir. 2014) 15

Thibodeau v. Comcast Corp.,
912 A.2d 874 (Pa. Super. Ct. 2006) 10

Tillman v. Commercial Credit Loans, Inc.,
655 S.E.2d 362 (N.C. 2008) 12

TABLE OF AUTHORITIES—Continued

Page

Trist v. Child,
88 U.S. (21 Wall.) 7

Vasquez-Lopez v. Beneficial Oregon, Inc.,
152 P.3d 940 (Or. App. 2007) 10

Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) 2

Williams v. Walker-Thomas Furniture Co.,
350 F.2d 445 (D.C. Cir. 1965) 18

STATUTES

Federal Arbitration Act
9 U.S.C. § 2 ..... passim

OTHER AUTHORITIES

David Horton,
Federal Arbitration Act Preemption, Purposivism, and State Public Policy,
101 GEO. L.J. 1217 (2013) 6

G. Richard Shell,
Contracts in the Modern Supreme Court,
81 CAL. L. REV. 433 (1993) 6

Hiro N. Aragaki,
Equal Opportunity for Arbitration,
58 UCLA L. REV. 1189 (2011) 4

INTEREST OF AMICI CURIAE

Amici curiae are law professors from the State of California.[1] *Amici* have years of experience teaching and publishing in arbitration, contracts, civil procedure, and related fields. *Amici* write to improve this Court's understanding of how California judges have interpreted the Federal Arbitration Act ("FAA").

SUMMARY OF ARGUMENT

The relief that Petitioner seeks is extraordinary. Petitioner's adhesive Customer Agreement prohibits arbitration if the law of a customer's state would invalidate its class arbitration waiver. The California Court of Appeal enforced this provision as written and held that because Petitioner's class arbitration waiver is invalid under California law, there is no agreement to arbitrate. Dissatisfied with the consequences of its own draftsmanship, Petitioner urges this Court to overturn the state panel's interpretation. But "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Info. Sciences, Inc. v. Bd.*

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have issued blanket consents to the filing of amicus briefs.

of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989).

Accordingly, Petitioner and its *amici* seek to transform this case into a referendum on the California judiciary's alleged "hostility to arbitration." Brief for Petitioner at 2; *see also generally* Brief of Amicus Curiae DRI—The Voice of the Defense Bar In Support of Petitioner DIRECTV, Inc. ("DRI Brief").[2] By detailing the California Supreme Court's alleged "attempts to evade the FAA's mandate," *id.* at 5, they hope to convince this Court of the need for heavy-handed intervention.

These gloomy atmospherics are a smokescreen. Petitioner's *amici* DRI, which leads the charge on this issue, devotes most of its brief to highlighting cases in which the California Supreme Court refused to enforce one-sided arbitration clauses that made it harder for plaintiffs to prosecute state statutory causes of action. *See id.* at 5-11. But DRI does not mention that most other jurisdictions take similar steps to ensure that substantive rights survive their transplant from the judicial to arbitral forum.

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[2] *See also* Brief of Chamber of Commerce of the United States of America, National Association of Manufacturers, and Retail Litigation Center, Inc., as Amici Curiae in Support of Petitioner ("Chamber Brief") at 4, 6-12 (arguing that the California Court of Appeal's opinion "impermissibl[y] discriminat[es] against arbitration"); Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner ("Pacific Legal Brief") at 19-21 ("The decision below continues a collision course upon which California courts have embarked with this Court's decisions regarding FAA preemption.").

DRI also contends that the California Supreme Court has given short shrift to this Court's opinions in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). *See* DRI Brief at 15-21. However, DRI condemns the state justices for not sharing *DRI*'s own, highly-idiosyncratic view that these cases preclude any "assessment of whether an arbitration agreement is sufficiently fair." *Id.* at 18. Moreover, DRI omits recent cases in which California judges have broadened the FAA's scope.

ARGUMENT

I. CALIFORNIA COURTS ARE NOT HOSTILE TO ARBITRATION

Petitioner's *amici* go to great lengths to try to get this Court to micromanage California's common law of contracts. For instance, DRI devotes nearly its entire brief to arguing that the California Supreme Court has "thwart[ed] the FAA." DRI Brief at 4.[3] That is simply not true. This section sets the record straight about California's FAA jurisprudence.

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[3] The California Supreme Court's only involvement in this matter was to deny discretionary review of the Court of Appeal's opinion. Moreover, even if it were possible to demonstrate that a constantly-evolving, multi-member court was capable of harboring continuing, collective animus toward arbitration, DRI does not explain how such a showing should inform the Court's preemption analysis.

A. California Courts Did Not Discriminate Against Arbitration Before *Concepcion*

DRI argues that the California Supreme Court routinely ignored the FAA's preemptive force during the period before this Court decided *Concepcion*. *See* DRI Brief at 3, 5-11. But on issue after issue, DRI faults the state high court for adopting majority or comparatively moderate positions.

First, citing cases such as *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999), DRI objects that the California justices invalidated arbitration clauses when necessary to "ensure that plaintiffs could vindicate state statutory rights." *Id.* at 3.[4] However, before *Concepcion*, this was not some wild-haired, deviant approach. To the contrary, it was a bedrock principle of federal arbitration law. As this Court repeatedly acknowledged, the choice between arbitration and litigation should not affect the outcome of a dispute:

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[4] In *Broughton*, the California Supreme Court compelled arbitration of a damages claim brought by a mother and her son against a health insurer. *See Broughton*, 988 P.2d at 71-72, 80. However, the state high court also held that it would be cost-prohibitive for the plaintiffs to arbitrate their request for a public injunction. *See id.* at 77-78. As the justices explained, because arbitral jurisdiction expires shortly after the award, and arbitrators' rulings do not have collateral estoppel effect, the plaintiffs would need to endure the cost, hassle, and uncertainty of filing a new arbitration whenever they needed to enforce or modify the decree. *Id.* at 77; *see also* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1252 (2011) ("*Broughton* was predicated on a particularized determination that there are real and unavoidable discontinuities between arbitration and litigation").

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 229 (1987); *Rodriguez de Quijas v. Shearson/*Am. Exp., Inc., 490 U.S. 477, 481 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 296 n.10 (2002).

Although these cases involved federal statutory causes of action, the FAA's guarantee of outcome-neutrality extended to state-created rights as well. As then-Judge John Roberts explained in a case involving alleged violations of District of Columbia anti-discrimination legislation, "[s]tatutory claims may be subject to agreements to arbitrate, so long as the agreement does not require the claimant to forgo substantive rights afforded under the statute." *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (noting that an arbitration clause cannot "prevent the vindication of statutory rights under state law").[5]

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[5] *Accord, Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208, 226 (Mich. 1999) (ordering state employment discrimination claim to arbitration on the condition that the

Putting a different rhetorical gloss on the same argument, DRI repeatedly accuses California courts of discriminating against arbitration by invoking the state's "public policy against exculpatory contracts." DRI Brief at 8-10. But that approach is entirely consistent with the FAA's text. Section 2, the statute's centerpiece, instructs courts to annul arbitration clauses under "generally applicable contract defenses." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). The defense of violation of public policy has long been "a rule of the common law of universal application." *Trist v. Child*, 88 U.S. (21 Wall.) 441, 448 (1874).[6] Courts from across the country have observed that "the tenet that a contract may be invalidated on grounds that it violates public policy is a principle of [s]tate contract law that 'arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Feeney v. Dell Inc.*, 908 N.E.2d 753, 768 (Mass. 2009) (quotation

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"procedures are fair so that the employee may effectively vindicate his statutory rights"); *Sec. Serv. Fed. Credit Union v. Sanders*, 264 S.W.3d 292, 300 (Tex. App. 2008) (striking down arbitration clause that impaired the plaintiffs' exercise of their Texas Deceptive Trade Practices Act rights).

[6] *See also* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1224, 1255-56 (2013) ("Congress debated and passed the statute during the golden age of the public policy doctrine—a time when courts held that a contract violated state public policy more frequently than they invoked garden-variety rules such as mistake, duress, lack of consideration, or the statute of frauds"); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 529 n.82 (1993) (observing that "the public policy [defense] had surprising vitality in many jurisdictions during the *Lochner* era").

omitted); *Picardi v. Eighth Judicial District*, 251 P.3d 723, 726 (Nev. 2011) ("courts may refuse to enforce [an arbitration clause] that contravenes the state's public policy"); *In Re Poly-Am., L.P.*, 262 S.W.3d 337, 347 (Tex. 2008) (rejecting the argument that "the FAA preempts all state public-policy grounds for finding the agreement to arbitrate unenforceable" because the statute "require[s] only that agreements to arbitrate be placed 'upon the same footing as other contracts'") (quoting *Doctor's Assocs.*, 517 U.S. at 687)).

Consider *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), which *Concepcion* abrogated. From DRI's brief, one might think that California stood alone by invalidating class arbitration waivers that exonerated defendants from numerous low-value claims. *See* DRI Brief at 9-10. But *Discover Bank* was the leading approach. Indeed, courts routinely nullified class arbitration waivers for serving as "exculpatory clause[s]," *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 99 (N.J. 2006), and giving drafters carte blanche to engage in "a broad range of wrongful conduct." *Scott v. Cingular Wireless*, 161 P.3d 1000, 1009 (Wash. 2007).[7]

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[7] *See also Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *Cooper v. QC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1279-80 (D. Ariz. 2007); *Powertel v. Bexley*, 743 So. 2d 570, 576 (Fla. Ct. App. 1999); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (applying Georgia law); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006); *Lazado v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000); *Feeney*, 908 N.E.2d at 762-68; *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 24 (Mo. 2010); *Fiser*

Likewise, DRI argues that *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) "invented" a rule "mandating a 'modicum of bilaterality' in arbitration—*i.e.*, that an arbitration clause required as a condition of employment must apply to both claims more likely to be brought by an employer and claims more likely to be brought by an employee." DRI Brief at 8. But *Armendariz* drew on a venerable line of cases from other jurisdictions that *prohibit* non-mutual arbitration clauses in *all contexts* by holding that they lack consideration. *See Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Management, Inc.*, 795 P.2d 1308, 1313 (Az. Ct. App. 1990).[8] According to these courts, because the FAA's separability doctrine treats arbitration clauses as independent contracts within broader "container" contracts, "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate." *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985).

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v. Dell Computer Corp., 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 746 (Wis. App. 2007); *Herron v. Century BMW*, 693 S.E.2d 394, 399 (S.C. 2010); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

[8] *See also Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997); *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 611–12 (4th Cir. 2013); *Independence Cnty. v. City of Clarksville*, 386 S.W.3d 395, 399 (Ark. 2012); *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 669 (Md. 2003); *Jimenez v. Cintas Corp.*, ___S.W.3d___, No. ED 101015, 2015 WL 160451, at *8 (Mo. Ct. App. Jan. 13, 2015).

Armendariz does not sweep nearly so far. It only governs adhesive employment agreements, not all contracts. Moreover, it merely factors an arbitration clause's imbalance into the unconscionability analysis, instead of deeming it to be a fatal lack of consideration. In fact, many states follow similar rules. *See, e.g., Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372 (N.C. 2008) ("[t]he one-sidedness of the clause . contributes to our overall conclusion that it is unconscionable"); *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 560 (W. Va. 2012) ("in assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation").[9]

In sum, DRI fails to prove that "California in particular has a history of aggressively refusing to enforce arbitration agreements." DRI Brief at 5. Before *Concepcion*, California was just one of many jurisdictions that exercised its prerogative under section 2 to police arbitration clauses for fairness.

B. California's Recent FAA Jurisprudence Has Also Been Faithful to this Court's Precedents

DRI also contends that California courts "have continued to resist the FAA's preemptive mandate" after *Concepcion Italian Colors*. DRI Brief at 15-20.

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[9] *See also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004) ("[t]he[se] cases do not necessarily express the impermissible view that arbitration is inferior to litigation, for a choice of remedies is better than being limited to one forum") (applying Louisiana law); *Berent v. CMH Homes, Inc.*, ___S.W.3d___, No. E201301214SCR11CV, 2015 WL 3526984, at *10 (Tenn. June 5, 2015) (rejecting the argument that *Concepcion* preempts these decisions).

But DRI criticizes the state judiciary for failing to conform to *DRI*'s unique reading of those opinions. In addition, DRI overlooks recent California decisions that have expanded the scope of the FAA.

According to DRI, *Concepcion* and *Italian Colors* require courts to robotically enforce arbitration clauses "even when this leads to a result at odds with state public policy, state unconscionability doctrine, or other principles of state law." DRI Brief at 30. This is a dramatic overstatement. Rather than immunizing flagrantly one-sided arbitration clauses from state law—a result that would write section 2 out of the statute—*Concepcion* and *Italian Colors* rejected the argument that *the class action device* was necessary for plaintiffs to vindicate "negative value" causes of action. Indeed, *Concepcion*'s core reasoning—that class arbitration "interferes with fundamental attributes of arbitration" because it is "slower, more costly, and more likely to generate procedural morass than final judgment"—does not extend beyond the class setting. *Concepcion*, 131 S.Ct. at 1748-51.[10]

Likewise, *Italian Colors* relied heavily on the fact that waiving the right to *aggregate* a claim does

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[10] In fact, *Concepcion* had no quarrel with the idea that both unconscionanility and violation of public policy are "generally applicable contract defenses" within the meaning of section 2. *See Concepcion*, 131 S.Ct. at 1746-47. Instead, *Concepcion* warned that these rules would be preempted if used in a way that is incompatible with the FAA's "purposes and objectives." *See id.* at 1747 (providing as an example "a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery").

not mean surrendering "*the right to pursue*" the claim. *Italian Colors*, 133 S.Ct. at 2310-11 ("The class-action waiver no more eliminates th[e] parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938."). This context-specific logic does not suggest that the FAA precludes states from determining that an arbitration clause eviscerates a particular plaintiff's substantive rights.

And indeed, the other cases that DRI cites do not support its breathtaking assertion that "[t]he FAA imposes a binding value judgment about the merits of enforcing arbitration agreements as written" without regard to the consequences. DRI Brief at 19. These decisions merely explain that state law cannot deem *the bare existence of an arbitration clause* to constitute a waiver of substantive rights. *See id.* at 18-20 (citing *McMahon*, 482 U.S. at 232; *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986); *Ex parte McNaughton*, 728 So. 2d 592, 597 (Ala. 1998); *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169 (10th Cir. 2014)). They do not speak to the discrete and more granular issue of whether state law can nullify *particular one-sided terms* within arbitration provisions.

For these reasons, nearly every court to consider the issue has recognized that *Concepcion* and *Italian Colors* "cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013); *In re Checking Account Overdraft Litig.* MDL No. 2036, 685 F.3d 1269, 1277 (11th Cir. 2012) ("[T]here are instances

wherein a state law may invalidate an arbitration agreement without being preempted by the FAA. Indeed, the phrase 'save upon such grounds as exist at law or in equity for the revocation of any contract' in § 2 must have meaning." (quoting 9 U.S.C. § 2)).[11]

Against this backdrop, DRI's critique evaporates. For example, DRI cites *Sonic Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013) ("*Sonic II*") as proof of the California Supreme Court's purported defiance of *Concepcion* and *Italian Colors*. DRI Brief at 16-20. In *Sonic II*, an arbitration clause waived an employee's entitlement to a "Berman hearing": an informal administrative proceeding designed to help employees bring wage claims. *See Sonic II*, 311 P.3d at 190-91. The state high court held that the FAA preempts a previous opinion that held that arbitration clauses can never eliminate an employee's Berman rights. *See id.* at 199-200. Yet the state justices also reasoned that because Berman hearings boast

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[11] *See also Smith v. Jem Grp., Inc.*, 737 F.3d 636, 641 (9th Cir. 2013) (applying Washington law); *In Re Checking Account Overdraft Litig.*, ___F. Supp. 3d___, No. 1:09-MD-02036, 2015 WL 464266, at *5 (S.D. Fla. Feb. 3, 2015); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, ___F. Supp. 3d___ No. CIV.A. 11-1219 JBS, 2014 WL 6863183, at *13 (D.N.J. Dec. 3, 2014); *Siopes v. Kaiser Found. Health Plan, Inc.*, 312 P.3d 869, 896 n.13 (Haw. 2013); *Schnuerle v. Insight Comm, Co., L.P.*, 376 S.W.3d 561, 578 (Ky. 2012); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 493 (Mo. 2012); *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 784 (Mont. 2013); *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, 306 P.3d 480, 486 (N.M. Ct. App. 2012); *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 640 (Wash. 2013).

special pro-employee features,[12] the relinquishment of these rights, like any other factor, can inform the unconscionability calculus:

> Waiver of these protections does not necessarily render an arbitration agreement unenforceable, nor does it render an arbitration agreement unconscionable per se. But waiver of these protections in the context of an agreement that does not provide an employee with an accessible and affordable arbitral forum for resolving wage disputes may support a finding of unconscionability.

Id. at 203. Although DRI complains that *Sonic II* "flout[s] *Concepcion*" by asking whether arbitration clauses are tainted by "unfairness," DRI Brief at 18, that very inquiry—whether an adhesive term is "overly harsh"—is the lynchpin of the unconscionability doctrine. *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Ct. App. 1982); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). The true target of DRI's ire is not the California judiciary, but section 2, which makes arbitration clauses susceptible to black-letter contract defenses.

Finally, DRI's speculation about the state justices' dark motives is impossible to square with the fact

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[12] Berman hearings include "procedural informality, assistance of a translator, . . . an expert adjudicator who is authorized to help the parties by questioning witnesses and explaining issues and terms, and provisions on fee shifting, mandatory undertaking, and assistance of the Labor Commissioner as counsel to help employees defend and enforce any award on appeal." *Sonic II*, 311 P.3d at 203.

that they have recently enlarged the FAA's ambit. Consider their treatment of class arbitration waivers in employment disputes. Previously, in *Gentry v. Superior Court*, 165 P.3d 556, 563-68 (Cal. 2007), the state supreme court had imported *Discover Bank*'s rule that certain class action bans are unconscionable from the consumer to the employment sphere. Then, after *Concepcion*, the National Labor Relations Board ("NLRB") held in *D.R. Horton Inc. v. Cuda*, 357 NLRB No. 184, 2012 WL 36274, *15-16 (2012), that class arbitration waivers violate the National Labor Relations Act. Nevertheless, in *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 135-37, 141-42 (Cal. 2014), the California Supreme Court determined that the FAA preempted *Gentry* and rejected the NRLB's conclusions in *Horton*. As the justices explained, "*Concepcion* held that the FAA prevent[s] states from mandating or promoting procedures incompatible with arbitration." *Id.* at 137. That is not the logic of a court so intent on "evad[ing]" the FAA that it "requires this Court's ongoing supervision." DRI Brief at 26.[13]

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[13] Similarly in *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1224-41 (Cal. 2012)—which DRI does not cite—the California Supreme Court became the first court in the country to enforce an arbitration clause that appeared in real property parcel's declaration of covenants, conditions, and restrictions ("CC&Rs"). The state high court held that the provision was binding on a homeowner's association even though its members "did not bargain . . . over the terms of the [p]roject CC&Rs or participate in their drafting." *Id.* at 1224-31 (noting that "[a]n arbitration clause within a contract may be binding on a party even if the party never actually read the clause"). In addition, the justices

CONCLUSION

This Court should affirm the California Court of Appeal's decision.

Respectfully submitted,

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rejected the trial court's finding that the arbitration provision was unconscionable. *See Id.* at 1223-34.

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In the Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND RETAIL LITIGATION CENTER, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

A. The Decision Below Impermissibly Discriminates Against Arbitration..... 6

B. The Decision Below Violates The Rule That Contractual Ambiguities Should Be Resolved In Favor Of Arbitration. 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Allied-Bruce Terminix Cos. v. *Dobson*,
513 U.S. 265 (1995) 6, 7, 8

Arthur Andersen LLP v. *Carlisle*,
556 U.S. 624 (2009) 7

AT&T Mobility LLC v. *Concepcion*,
131 S. Ct. 1740 (2011) ..... *passim*

Buckeye Check Cashing, Inc. v. *Cardegna*,
546 U.S. 440 (2006) 7

Doctor's Assocs. v. *Casarotto*,
517 U.S. 681 (1996) 6, 7, 8, 9

EEOC v. *Waffle House, Inc.*,
534 U.S. 279 (2002) 6

Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*,
458 U.S. 141 (1982) 10

Marmet Heath Care Ctr., Inc. v. *Brown*,
132 S. Ct. 1201 (2012) (per curiam) 7, 8

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514 U.S. 52 (1995) 8, 13, 15, 16

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473 U.S. 614 (1985) 12, 15

Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*,
460 U.S. 1 (1983) 12, 15

Murphy v. *DIRECTV, Inc.*,
724 F.3d 1218 (9th Cir. 2013) 4, 10, 11, 16

TABLE OF AUTHORITIES—continued

Page(s)

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133 S. Ct. 500 (2012) (per curiam) 16

California v. *Sischo*,
144 P.2d 785 (Cal. 1943) (per curiam) 10

Perry v. *Thomas*,
482 U.S. 483 (1987) 6, 7, 8

Preston v. *Ferrer*,
552 U.S. 346 (2008) 6, 7

Rent-A-Center, W., Inc. v. *Jackson*,
561 U.S. 63 (2010) 7

Rivers v. *Roadway Express, Inc.*,
511 U.S. 298 (1994) 16

Scherk v. *Alberto-Culver Co.*,
417 U.S. 506 (1974) 6, 7

Southland Corp. v. *Keating*,
465 U.S. 1 (1984) 6, 7, 8

Stolt-Nielsen S.A. v. *AnimalFeeds Int'l Corp.*,
559 U.S. 662 (2010) 3

Volt Info. Scis., Inc. v. *Board of Trs. of Leland Stanford Jr. Univ.*,
489 U.S. 468 (1989) 7

CONSTITUTION AND STATUTES

U.S. Const. art. VI, cl. 2 .....10, 11, 16

Federal Arbitration Act, 9 U.S.C. §§ 1-16.....*passim*
9 U.S.C. § 2 ..... 6, 8

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND RETAIL LITIGATION CENTER, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.[1]

The National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million people, contributes roughly $2.1 trillion to the national economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office.

legislative and regulatory environment conducive to economic growth.

The Retail Litigation Center, Inc., is a public-policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues affecting its members, and to highlight the potential industry-wide consequences of significant pending cases.

Arbitration agreements allow the parties to replace expensive, time-consuming, and contentious in-court litigation with speedy, inexpensive, fair, and often far less adversarial dispute-resolution procedures. For these reasons, many of *amici*'s members and affiliates routinely employ arbitration agreements as a key element in millions of their contractual relationships. As Congress intended when it enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16, the result has been not only conservation of judicial resources but also substantial cost savings for the parties, which in turn have allowed for lower prices for consumers, higher wages for employees, and benefits for the national economy as a whole.

The many benefits of arbitration agreements are threatened when courts impose or enforce state-law rules that do not apply uniformly to all contracts or are inconsistent with the strong federal presumption in favor of arbitrability. Although this Court has consistently condemned such discriminatory rules, some

state courts persist in their determined efforts to circumvent federal law. Accordingly, *amici* have a strong interest in ensuring that decisions like the one here that are starkly inconsistent with this Court's FAA precedents are not allowed to stand.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has observed that "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1747 (2011). The decision of the California Court of Appeal in this case represents just such a device—and one that poses a particularly troubling threat to the uniform, consistent application of the FAA and this Court's precedents throughout the nation.

The vast majority of arbitration agreements today require that disputes be resolved on an individual rather than classwide basis. That is because class proceedings are irreconcilable with the simplicity, informality, and expedition that are the hallmarks of arbitration. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-687 (2010); see also *Concepcion*, 131 S. Ct. at 1749-1753. The contract at issue here, for example, specifies that the parties agree not "to join or consolidate claims in arbitration * * * or arbitrate any claim as a representative member of a class or in a private attorney general capacity." Pet. App. 5a (internal quotation marks omitted).

That arbitration provision self-evidently was designed to apply as part of a uniform contract in the many states in which DIRECTV operated. It was drafted before this Court issued its decision in *Con-*

cepcion, when some courts (especially in California) not only refused to enforce agreements to arbitrate on an individual basis, but also ordered—contrary to the parties' agreements—that arbitration take place on a classwide basis. Recognizing that phenomenon—and seeking to make doubly sure that arbitrations would be conducted on an individual basis only—the arbitration agreement expressly provided that if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable." Pet. App. 5a (internal quotation marks omitted).

In a linguistic backflip that the Ninth Circuit properly termed "nonsensical" (*Murphy* v. *DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013)), the California Court of Appeal here interpreted the parties' additional safeguard not as an express statement of intent to require individual arbitration and avoid classwide arbitration, but instead as an agreement to divert claims from individual arbitrations to judicial class actions. Indeed, the court held that the safeguard applies even if the state-law rules requiring class procedures are preempted by the FAA.

The California Court of Appeal adopted so tortured a reading of clear contract language that its conclusion can be explained only as the singling out of the parties' arbitration agreement for suspect status. The court's decision thus constitutes impermissible discrimination against arbitration. Indeed, it reflects the precise judicial hostility toward arbitration that Congress enacted the FAA to forestall.

The California Court of Appeal also violated the principle that, as a matter of federal law, any ambiguities in arbitration agreements must be resolved in

favor of arbitration. The court concluded that the arbitration provision here was subject to two possible interpretations, and then, ignoring the FAA's requirement that ambiguities in arbitration agreements be construed in favor of arbitration, chose an unnatural reading of the contract that *disfavored* arbitration—interpreting the arbitration agreement in a manner that served to void it.

The lower court's failure to abide by these settled principles reflects not only hostility toward arbitration, but also an effort to evade the FAA and this Court's precedents interpreting the statute. This Court should reverse the holding below and reaffirm the supremacy of federal law.

ARGUMENT

The rules for interpreting contracts are generally the province of state law. With respect to arbitration agreements, however, the FAA constrains state law. It prescribes two federal-law principles to prevent courts from manipulating state law to undermine private parties' federal right to agree to resolve their disputes efficiently and fairly through arbitration. First, state law must not discriminate against arbitration or be applied in a manner that disfavors arbitration agreements. Second, any ambiguity in the terms of an arbitration agreement must be resolved in favor of arbitration.

The decision below violates both principles. And it does so in a particularly pernicious way, by construing the plain language of an arbitration agreement in an idiosyncratic manner to circumvent this Court's binding FAA precedents and thereby frustrate Congress's intent to promote the use of arbitration to resolve disputes. The Court should make

clear—once again—that state-law determinations violating these principles are preempted by the FAA.

A. The Decision Below Impermissibly Discriminates Against Arbitration.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted); see also, *e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) ("Section 2 'declare[s] a national policy favoring arbitration' of claims that parties contract to settle in that manner.") (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (FAA "seeks broadly to overcome judicial hostility to arbitration agreements").

At the heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (emphasis added) (quoting 9 U.S.C. § 2). "By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk* v. *Alberto-Culver Co.*, 417

U.S. 506, 511 (1974)). State-law rules that discriminate against arbitration are flatly forbidden.[2]

In *Casarotto*, for example, this Court held that "threshold limitations placed specifically and solely on arbitration provisions" are unenforceable because they are "antithetical to" the "'goals and policies' of the FAA" to promote arbitration by treating arbitration agreements as favorably as any other contract. 517 U.S. at 688. Thus, the Court concluded that the FAA preempted a Montana statute requiring special notice of an arbitration provision on the first page of a contract, because the statute "singl[ed] out arbitration provisions for suspect status." *Id.* at 687.

The Court refused to excuse this special notice requirement as a particular application of a general state policy that unexpected contract terms must be conspicuous, and instead reiterated that "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot.'" *Casarotto*, 517 U.S. at 687 n.3 (quoting *Perry*, 482 U.S. at 492 n.9).

The Court has likewise held, in a long string of decisions, that the FAA preempts and forbids en-

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[2] See, *e.g.*, *Marmet Heath Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston*, 552 U.S. at 356; *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce*, 513 U.S. at 270-271; *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland*, 465 U.S. at 10-11 & 16 n.11.

forcement of state-law rules categorically "prohibiting arbitration of a particular type of claim," because such state-law bars are "contrary to the terms and coverage of the FAA." *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) (FAA preempted state-law ban on arbitration of claims against nursing homes); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA preempted state law requiring judicial resolution of claims involving punitive damages); *Perry*, 482 U.S. at 489-491 (FAA preempted state law requiring that litigants be provided a judicial forum for wage disputes); *Southland*, 465 U.S. at 10 ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," including for claims brought under state franchise-investment law).

2. The FAA permits states to apply general state-law principles of contract interpretation to ascertain the meaning of an agreement to arbitrate, as long as those rules "govern * * * the validity, revocability, and enforceability of contracts *generally*." *Perry*, 482 U.S. at 492 n.9 (emphasis added). "A court may not * * * construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Ibid.*; see also, *e.g.*, *Casarotto*, 517 U.S. at 686-688; *Allied-Bruce*, 513 U.S. at 281.

The California Court of Appeal in this case professed to engage in ordinary contract interpretation, but the tortured and illogical manner in which it did so "singl[ed] out [the] arbitration provision[] for sus-

pect status" (*Casarotto*, 517 U.S. at 687), thereby impermissibly discriminating against arbitration.

As explained above (at 3-4), the arbitration agreement here expressly required arbitrations to take place on an individual rather than classwide basis. Indeed, class arbitration was so antithetical that the agreement invalidated itself if class arbitration were required by the governing law: "[I]f 'the law of your state would find this agreement to dispense with class arbitration procedures unenforceable'"—thereby permitting enforcement of the arbitration agreement only if class arbitration were available—"'then this entire [arbitration provision] is unenforceable.'" Pet. App. 6a (quoting contract).

The parties also agreed that "'[t]he interpretation and enforcement of this Agreement shall be governed by * * * applicable federal laws, and the laws of the state and local area where Service is provided to you,'" and further specified that, "'[n]otwithstanding the foregoing, [the arbitration provision] shall be governed by the Federal Arbitration Act.'" Pet. App. 5a (quoting contract).

Despite the contract's express designation of the FAA to govern the arbitration provision, the California Court of Appeal interpreted the self-invalidation clause—rendering the arbitration provision void if "the law of your state" precluded class-arbitration waivers—to be triggered by "'the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA." Pet. App. 13a-14a; see also *id.* at 8a.

The lower court's analysis is starkly inconsistent with generally applicable principles of contract interpretation. Contractual provisions referring to the

"law of" a particular state are commonplace, and they are construed to incorporate *both* state *and* federal law—not to exclude application of federal law. See *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 157 n.12 (1982) ("Paragraph 15 provides that the deed is to be governed by the 'law of the jurisdiction' in which the property is located; but the 'law of the jurisdiction' includes federal as well as state law."). That general principle holds true in California as well (at least outside the arbitration context). See *California* v. *Sischo*, 144 P.2d 785, 791-792 (Cal. 1943) (per curiam) ("The Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land * * * *to the same extent as though expressly written into every state law.*") (emphasis added; citing Supremacy Clause, U.S. Const. art. VI, cl. 2).

As the Ninth Circuit explained with respect to the very provision at issue in this case:

> The Customer Agreement's reference to state law "does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'"

Murphy, 724 F.3d at 1226 (quoting *de la Cuesta*, 458 U.S. at 157).

For that reason, *Concepcion*'s holding that the FAA preempts the California state-law rule banning class-arbitration waivers necessarily means that the state ban "is not, and indeed never was, California

law." *Murphy*, 724 F.3d at 1226. As a matter of federal law and fundamental constitutional principles, the "contention that the parties intended for state law to govern the enforceability of DIRECTV's arbitration clause, even if the state law in question contravened federal law, is nonsensical." *Ibid.* And that is especially so given the arbitration provision's express statement that it is governed by the FAA.

Moreover, the Supremacy Clause demands as much: "A contract cannot be unenforceable under state law if federal law requires its enforcement, because federal law is 'the supreme Law of the Land , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Murphy*, 724 F.3d at 1226 (quoting U.S. Const. art. VI, cl. 2). When the parties here agreed that disputes must be arbitrated, and that the arbitrations must occur on an individual basis unless "the law of your state" forbids class-action waivers, the term "law of your state" necessarily meant, and continues to mean, "the valid, enforceable law of your state."

Perhaps California could adopt a general principle of contract interpretation that—contrary to the plain meaning of "the law of your state" or "the law of the State of California"—such phrases must be interpreted to mean "state law without consideration of federal law." That would mean that *any* contract expressly incorporating California state law would have to be read to forbid application of conflicting federal law, even if, as here, the contract on its face also incorporates federal law. Such a generally applicable state-law rule would upend the settled expectations of parties to an untold number of contracts affecting citizens and businesses throughout California.

Unsurprisingly, there is absolutely no evidence that California has adopted such a rule in any other context—much less one that would apply to all contracts. For its part, the California Court of Appeal did not identify any such authority. Rather, the interpretive principle applied here was invented solely to invalidate an arbitration agreement, and this arbitration-specific rule therefore violates Section 2 of the FAA.

B. The Decision Below Violates The Rule That Contractual Ambiguities Should Be Resolved In Favor Of Arbitration.

Even assuming for the sake of argument that the meaning of the arbitration provision here was unclear, the decision below violates a second key principle of the FAA: In light of the statute's "emphatic federal policy in favor of arbitral dispute resolution" (*Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)), this Court has declared that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (*Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added)).[3] The decision below does just the opposite.

1. The California Court of Appeal concluded that the self-invalidation clause in the arbitration provision here was not "explicit" as to whether the parties intended for state law to apply "to the extent [that] it

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[3] Accord *Mitsubishi*, 473 U.S. at 631.

is not preempted by the FAA" or whether they instead intended for state law to apply "without considering the preemptive effect, if any, of the FAA." Pet. App. 8a (internal quotation marks omitted). Asserting that the self-invalidation clause is for that reason "ambiguous," the court then invoked "'the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it'" (*id.* at 10a (quoting *Mastrobuono*, 514 U.S. at 62)).

Purporting to apply that principle, the court held that because DIRECTV had drafted the contract and had not expressly specified that controlling federal precedent would apply, the contract should be construed, against DIRECTV, to forbid application of federal precedent. Pet. App. 10a-11a. The court further reasoned that "'it seems unlikely that' plaintiffs anticipated in 2007 that the Supreme Court would hold in 2011 that the FAA preempts the *Discover Bank* rule concerning the enforceability of class action waivers in arbitration agreements." *Id.* at 11a.

The California Court of Appeal brushed aside the parties' express agreement that the FAA governed the arbitration provision and refused to impute to the parties the intent to apply binding interpretations of federal law. Pet. App. 11a. It therefore concluded that the contract required it to treat this Court's decision in *Concepcion* (which had invalidated the state-law rule) as irrelevant and instead to apply California's ban on class-action waivers despite the fact that this state-law rule is preempted by federal law.

2. The California Court of Appeal erred in concluding that the arbitration agreement is ambiguous

about whether its self-invalidation mechanism incorporated federal as well as state law.

The parties expressly agreed that (1) "applicable federal laws" do in fact apply, (2) the FAA is one of those laws, and (3) the FAA governed the arbitration provision over and above the parties' general selection of local state law. See Pet. App. 5a ("The interpretation and enforcement of this Agreement shall be governed by * * * applicable federal laws, and the laws of the state and local area where Service is provided to you," but "[n]otwithstanding the foregoing, [the arbitration provision] shall be governed by the Federal Arbitration Act."). Despite that clear language, the California Court of Appeal treated the parties' agreement to require individual arbitration and forbid class arbitration as instead foreclosing individual arbitration.

The court's reading of the parties' agreement—transforming a contractual commitment to resolve the parties' disagreements through individual arbitration into an agreement to eschew arbitration and instead to resolve disputes through judicial class actions—comports with no rule of contract interpretation of which we are aware, in California or anywhere else. Rather, it stands the parties' intent and the ordinary rules of contract interpretation on their head. The California Court of Appeal's conclusion that ambiguity existed in the arbitration provision's language is so inimical to settled rules of contract interpretation that it cannot be explained except as the product of judicial hostility toward arbitration—the very thing that Congress meant to bar when it passed the FAA.

3. Even if the contract's reference to "the law of your state" were ambiguous because it could plausi-

bly be read to include preempted state statutes and court decisions, the alternate reading—based on the settled rule that preempted state law is a legal nullity—is undeniably plausible as well. Under such circumstances, this Court's precedents are clear that the FAA requires courts to resolve the contractual ambiguity in favor of arbitration. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved *in favor of arbitration*, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25 (emphasis added); see also *Mitsubishi*, 473 U.S. at 631.

The decision below (Pet. App. 10a) relied on this Court's decision in *Mastrobuono* to justify its reliance on the common-law principle that contractual terms are construed against the drafter, instead of following the FAA's requirement that ambiguities must be resolved in favor of arbitration. But *Mastrobuono* did not hold, or even suggest, that the *Federal* Arbitration Act takes a backseat to the *state*-law maxim. That would be a surprising inversion of the Supremacy Clause.

What *Mastrobuono* did was to decide the question presented—whether the contract at issue authorized arbitration of punitive-damages claims—by applying the strong federal policy *favoring* arbitration. The Court first drew the pro-arbitration conclusion that punitive-damages claims are arbitrable absent a clear statement of the parties' contrary intent, which the parties had not made. 514 U.S. at 57-62. The Court then explained that (in the context of that case) construing the language of the arbitration provision against the drafter lent further support to the

conclusion that the dispute was subject to arbitration. *Id.* at 62-63.

The Court did not so much as hint in *Mastrobuono* that the common-law presumption should trump the FAA's presumption of arbitrability when the two point in opposite directions—much less that the former should trump the latter when, as here, the supposed contractual ambiguity is starkly at odds with the plain intent of the contract (to require individual arbitration), the Supremacy Clause, and common sense. *Cf. Murphy*, 724 F.3d at 1225-1226 (describing reasoning later adopted by court below as "nonsensical").

* * *

The California Court of Appeal's ruling in this case attempts a transparent end-run around the FAA. As this Court has explained in the past, the lower courts "must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2," and must faithfully apply "the opinions of this Court interpreting that law. '* * * [O]nce [this] Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500, 503 (2012) (per curiam) (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)). Because "the FAA forecloses precisely this type of 'judicial hostility towards arbitration'" (*ibid.* (quoting *Concepcion*, 131 S. Ct. at 1747)), the decision below cannot stand.

CONCLUSION

The judgment of the California Court of Appeal should be reversed and the case should be remanded for enforcement of the arbitration agreement.

Respectfully submitted.

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No. 14-462

In The
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER DIRECTV, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE CALIFORNIA SUPREME COURT HAS LONG RESISTED THE FAA'S PREEMPTIVE EFFECT. 5

II. IN *CONCEPCION* AND *ITALIAN COLORS*, THIS COURT CLARIFIED THE BROAD PREEMPTIVE SCOPE OF THE FAA, CRITICIZED STATE COURT EFFORTS TO RESIST ARBITRATION, AND REJECTED THE COST OF VINDICATING STATUTORY RIGHTS IN ARBITRATION AS A REASON FOR NOT ENFORCING CLASS ARBITRATION WAIVERS. 12

III. SINCE *CONCEPCION*, STATE COURTS HAVE CONTINUED TO RESIST THE PREEMPTIVE EFFECT OF THE FAA..... 15

IV. THE CALIFORNIA COURT OF APPEAL'S DECISION IN THIS CASE IS SIMPLY THE LATEST ATTEMPT TO EVADE *CONCEPCION* AND THE FAA.... 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Express Co. v. Italian Colors Rest.,
570 U.S. __, 133 S. Ct. 2304 (2013) .....*passim*

Armendariz v. Foundation Health Psychcare Services, Inc.,
24 Cal. 4th 83, 6 P.3d 669 (2000) 7, 8, 9, 10, 17

AT&T Mobility LLC v. Concepcion,
563 U.S. __, 131 S. Ct. 1740 (2011) .....*passim*

Atalese v. U.S. Legal Services Group, L.P.,
219 N.J. 430, 99 A.3d 306 (2014),
petition for cert. filed, __ U.S.L.W. __
(U.S. Jan. 21, 2015) (No. 14-882) 26

Brewer v. Missouri Title Loans,
364 S.W.3d 486 (Mo. 2012) 24, 25

Broughton v. Cigna Healthplans of Cal.,
21 Cal. 4th 1066, 988 P.2d 67 (1999) 5, 6, 7

Coleman v. Prudential Bache Sec., Inc.,
802 F.2d 1350 (11th Cir. 1986)..... 19

Cruz v. PacifiCare Health Sys., Inc.,
30 Cal. 4th 303, 66 P.3d 1157 (2003) 6

Discover Bank v. Superior Court,
36 Cal. 4th 148, 113 P.3d 1100 (2005)..... 9, 10, 11, 13, 28

Ex parte McNaughton,
728 So. 2d 592 (Ala. 1998) 19

Ferguson v. Corinthian Colls., Inc.,
733 F.3d 928 (9th Cir. 2013) 6

Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982) 4, 29

Gandee v. LDL Freedom Enterprises, Inc.,
176 Wash. 2d 598, 293 P.3d 1197 (2013) ... 23, 24

Gentry v. Superior Court,
42 Cal. 4th 443, 165 P.3d 556 (2007) ... 10, 11, 20

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 6, 7

Hauenstein v. Lynham,
100 U.S. 483 (1880) 29

In re Am. Express Merchs.' Litig.,
667 F.3d 204 (2d Cir. 2012) 14

Iskanian v. CLS Transportation Los Angeles, LLC,
59 Cal. 4th 348, 327 P.3d 129 (2014) 20, 21

Kelker v. Geneva-Roth Ventures, Inc.,
369 Mont. 254, 303 P.3d 777 (2013) 25

Little v. Auto Stiegler, Inc.,
29 Cal. 4th 1064, 63 P.3d 979 (2003) 8, 9, 10

Marmet Health Care Ctr., Inc. v. Brown,
565 U.S. __, 132 S. Ct. 1201 (2012)
(per curiam) 4, 21, 22, 29

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 6, 17, 23

Morales v. Sun Constructors, Inc., 541 F.3d 218 (3d Cir. 2008) 26

Mortensen v. Bresnan Commc'ns, LLC, 722 F.3d 1151 (9th Cir. 2013) 25

Murphy v. DIRECTV, Inc., 724 F.3d 1218 (9th Cir. 2013) 4, 28

Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. __, 133 S. Ct. 500 (2012) (per curiam) 3, 6, 22, 28, 29

Perry v. Thomas, 482 U.S. 483 (1987) 8, 23

Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594 (6th Cir. 2013) 19

Schnuerle v. Insight Communications Co., 376 S.W.3d 561 (Ky. 2012) 23

Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) 6, 18

Sonic-Calabasas A, Inc. v. Moreno (*Sonic I*), 51 Cal. 4th 659, 247 P.3d 130 (2011) 11, 16

Sonic-Calabasas A, Inc. v. Moreno, 565 U.S. __, 132 S. Ct. 496 (2011) 16

Sonic-Calabasas A, Inc. v. Moreno (*Sonic II*),
57 Cal. 4th 1109, 311 P.3d 184
(2013) 16, 17, 18, 19, 21

Southland Corp. v. Keating,
465 U.S. 1 (1984) 23

Sutherland v. Ernst & Young LLP,
847 F. Supp. 2d 528 (S.D.N.Y. 2012),
rev'd, 726 F.3d 290 (2d Cir. 2013) 14

Testa v. Katt,
330 U.S. 386 (1947) 29

THI of N.M. at Hobbs Ctr., LLC v. Patton,
741 F.3d 1162 (10th Cir. 2014) 20

Truly Nolen of Am. v. Superior Court,
208 Cal. App. 4th 487,
145 Cal. Rptr. 3d 432 (2012) 13

Constitutions

U.S. Const., art. VI, cl. 2 4

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar (DRI) is an international organization that includes more than 21,000 members involved in the defense of civil litigation. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

This case is of significant interest to DRI because its members routinely represent clients seeking to compel arbitration of claims brought under consumer protection, wage and hour, or other state laws that are subject to binding arbitration clauses. Accordingly, DRI's members are familiar with the common occurrence of state courts refusing to enforce arbitration clauses (including in class action litigation) because of state public policy, unconscionability principles, or other tenets of state law.

This case represents the latest in a long line of state court cases refusing to enforce the preemptive

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[1] This brief was authored by *amicus curiae* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. *Amicus curiae* has notified the parties of its intention to file this brief. All parties provided written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

mandate of the Federal Arbitration Act (FAA) that arbitration clauses be enforced according to their terms. Of particular concern to DRI and its members is the California Court of Appeal's refusal to acknowledge the basic constitutional principle, embodied in the Supremacy Clause of the U.S. Constitution, that federal law is part of the law of every state and that state law to the contrary is invalid.

DRI and its members seek uniform application of the FAA across the nation in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. The California Court of Appeal's decision in this case thwarts that goal. This Court should reverse the California Court of Appeal's decision.

SUMMARY OF ARGUMENT

Enacted "in response to widespread judicial hostility to arbitration," the Federal Arbitration Act (FAA) requires courts to "'rigorously enforce' arbitration agreements according to their terms," including the terms setting "'the rules under which that arbitration will be conducted.'" *Am. Express Co. v. Italian Colors Rest.* (*Italian Colors*), 570 U.S. __, 133 S. Ct. 2304, 2308-09 (2013).

As this Court has recognized, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great

importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. __, 133 S. Ct. 500, 501 (2012) (per curiam). Unfortunately, state courts have long exhibited the very "judicial hostility towards arbitration that prompted the FAA" decades ago, and have employed "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 1747 (2011). "California's courts" in particular "have been more likely" to apply their own state laws to preclude the enforcement of arbitration agreements. *Id.*

Before this Court's seminal decision in *Concepcion*, the California Supreme Court used various devices to evade the preemptive force of the FAA. Beginning in 1999, in an effort to ensure that plaintiffs could vindicate state statutory rights that California had deemed essential as a matter of state public policy, California's high court held that the FAA did not preempt state public policies that prohibited enforcement of certain types of arbitral procedures or arbitration of particular types of claims. But *Concepcion* made clear that state courts had been wrong in so narrowly construing the preemptive scope of the FAA, holding that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'" and that states cannot—whether in the guise of unconscionability, public policy, or some other state law defense—"require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1747-48, 1753.

Despite *Concepcion*'s sharp rebuke, California and other state courts have persisted in using unconscionability, vindication of state public policy, and similar rationales to resist the mandate of the FAA. The California Court of Appeal's opinion in this case is simply the latest example of this continuing trend. That court interpreted the arbitration clause in DIRECTV's customer agreement by looking to California law directly overruled by *Concepcion*. Pet. App. 6a-10a. This reading violates the Supremacy Clause of the U.S. Constitution, as there is no such thing as state law divorced from the preemptive effect of federal law. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 & n.12 (1982); *see also Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1225-26 (9th Cir. 2013). California may not "opt out" of the Supremacy Clause, no matter how important its contrary state policy may be. "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. VI, cl. 2." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201, 1202 (2012) (per curiam).

This brief will trace the history of California and other state courts' efforts to avoid enforcing arbitration agreements according to their terms, as mandated by the FAA, and will show how that unfortunate trend continues to this day. As this historical overview confirms, this Court's ongoing vigilance is necessary to ensure that state courts do not thwart the FAA's purpose as they have so often done in the past. This Court should hold that state courts cannot divorce their own laws from the FAA and should direct

California courts in particular—with their long history of attempts to evade the FAA's mandate—to enforce arbitration agreements according to their terms, as federal arbitration law commands.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT HAS LONG RESISTED THE FAA'S PREEMPTIVE EFFECT.

The California Court of Appeal's effort to circumvent the FAA in this case is not a unique occurrence. Rather, it is part of a long-standing hostility among state courts towards the FAA. California in particular has a history of aggressively refusing to enforce arbitration agreements, notwithstanding this Court's rulings to the contrary. *See Concepcion*, 131 S. Ct. at 1747. To illustrate the point, we provide a brief history of the California Supreme Court's longstanding resistance to this Court's FAA precedents.

1. ***Broughton.*** In a 1999 opinion, the California Supreme Court recognized that this Court's decisions had previously discussed "whether *Congress* had intended *federal statutory claims* to be exempt from arbitration." *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1082-83, 988 P.2d 67, 78 (1999) (second emphasis added). *Broughton*, however, applied this Court's "vindication" of *federal* claims to claims asserting *state* statutory rights under California's Consumers Legal Remedies Act, in order to avoid a

perceived potential for "the vitiation through arbitration of the substantive rights afforded by" state statutes. *Id.* at 1083, 988 P.2d at 79; *see also Cruz v. PacifiCare Health Sys., Inc.*, 30 Cal. 4th 303, 307, 66 P.3d 1157, 1159 (2003) (reaffirming *Broughton*'s holding and extending it to forbid arbitration of public injunctive relief claims brought under California's Unfair Competition Law and False Advertising Law).

The California Supreme Court failed to appreciate that while Congress is free to enact federal laws that override or limit earlier federal laws, including the FAA, the states are not. The federal rights vindication exception posited by this Court derives from "the *congressional* intention expressed in some other [federal] statute" in which "*Congress* itself has evinced an intention" to exempt federal statutory rights from arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985) (emphases added). In that narrow context, this Court has suggested that, where a party cannot effectively vindicate a *federal statutory claim* in the arbitral forum, an inherent conflict may exist between arbitration and the underlying purpose of a *federal* statute sufficient to override the FAA's mandate. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226-27, 242 (1987).

In short, the so-called "vindication" exception to the FAA is "reserved for claims brought under federal statutes" because it "rest[s] on the principle that other federal statutes stand on equal footing with the FAA." *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013); *see also Nitro-Lift*, 133 S. Ct. at 504

("[T]he ancient interpretive principle that the specific governs the general . . applies only to conflict between laws of equivalent dignity. Where a specific statute, for example, conflicts with a general constitutional provision, the latter governs. And the same is true where a specific state statute conflicts with a general federal statute. There is no general-specific exception to the Supremacy Clause ").

But, in *Broughton*, the California Supreme Court held a vindication defense may be applied to hold that state statutory claims survive FAA preemption because arbitration is inappropriate where the arbitral forum "cannot necessarily afford" all the procedural "advantages" available in court. 21 Cal. 4th at 1083, 988 P.2d at 78-79.

2. ***Armendariz.*** One year after it decided *Broughton,* the California Supreme Court held, in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 90-91, 99-103, 6 P.3d 669, 674, 679-82 (2000), that courts can, as a matter of state public policy, refuse to enforce mandatory employment agreements to arbitrate unwaivable state statutory claims for employment discrimination if the procedures the parties adopted in their contract threaten the ability of a party to fully and effectively vindicate a state statutory claim in the arbitral forum. *Id.* at 99-103, 6 P.3d at 680-82 (citing *Broughton*, 21 Cal. 4th at 1087, 988 P.2d at 81-82, and *Gilmer*, 500 U.S. at 27-28). *Armendariz* reasoned that this refusal to enforce was not preempted by the FAA because federal cases permitted courts not to enforce arbitration agreements where the "arbitral forum" would not be "adequate" to

vindicate certain statutory rights. *See Armendariz*, 24 Cal. 4th at 98-99, 6 P.3d at 679-80.

Armendariz also held the arbitration clause at issue to be unconscionable. Rather than apply general principles of unconscionability law, the court invented arbitration-specific rules mandating a "modicum of bilaterality" in arbitration—i.e., that an arbitration clause required as a condition of employment must apply to both claims more likely to be brought by an employer and claims more likely to be brought by an employee. *Id.* at 117-18, 6 P.3d at 692-93. In reaching this conclusion, the California Supreme Court rejected the notion that its version of unconscionability law impermissibly "takes its meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987), and thus was preempted by the FAA. Instead, it held that "ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz*, 24 Cal. 4th at 119, 6 P.3d at 693.

3. ***Little.*** Next, in *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1076-81, 63 P.3d 979, 987-90 (2003), the California Supreme Court reiterated *Armendariz*'s state public policy limitation on the enforceability of arbitration agreements governed by the FAA. *Little* emphasized that California's public policy against exculpatory contracts renders certain state-law claims unwaivable, and that this policy would be violated unless the parties' agreed-upon arbitration procedures matched up with the procedures that *Armendariz* said were "necessary to enable an

employee to vindicate these unwaivable rights in an arbitration forum." *Id.* at 1076-77, 63 P.3d at 987.

Little acknowledged that *Armendariz*'s vindication of state public policy "specifically concern[ed] arbitration agreements" and was "unique" to the "context of arbitration." *Id.* at 1079, 63 P.3d at 989. *Little* nonetheless maintained that this vindication defense was not preempted by the FAA. *Id.*, 63 P.3d at 988-89. *Little* relied on the FAA saving clause permitting courts not to "enforce an arbitration agreement based on 'generally applicable contract defenses.'" *Id.*, 63 P.3d at 989. According to *Little*, one such defense is California's public policy against exculpatory contracts that "force a party to forgo unwaivable public rights." *Id.* at 1079-80, 63 P.3d at 989.

Little also further developed California's arbitration-specific unconscionability rules. *Little* held that one type of substantively unconscionable arbitration clause originates with "the party imposing arbitration [who] mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed." *Id.* at 1072, 63 P.3d at 984. The court then invalidated a contractual term authorizing either party to appeal to a second arbitrator from an arbitral award exceeding $50,000, concluding it would unduly favor defendants over plaintiffs. *Id.* at 1071-74, 63 P.3d at 983-85.

4. ***Discover Bank.*** Two years later, in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160-73, 113 P.3d 1100, 1108-17 (2005), the California

Supreme Court invoked the vindication of state law principle applied in *Armendariz* and *Little*, this time under the rubric of unconscionability.

Discover Bank addressed whether courts may invalidate class arbitration waivers pursuant to an unconscionability defense. *Id.* at 152-53, 160-63, 113 P.3d at 1103, 1108-10. The California Supreme Court held that, since class actions and arbitrations are "often inextricably linked to the vindication" of substantive state rights, such waivers are contrary to California public policy and therefore unconscionable when class actions are the only effective way to halt and redress wrongful conduct. *Id.* at 160-63, 113 P.3d at 1108-10. As with the vindication of state public policy defense against arbitration adopted in *Armendariz* and *Little*, *Discover Bank* held that the FAA did not preempt its unconscionability holding because, while it was tailored to arbitration agreements, the finding of unconscionability could be traced to a general state public policy against exculpatory contracts. *See id.* at 163-67, 113 P.3d at 1110-13.

5. ***Gentry.*** *Gentry v. Superior Court*, 42 Cal. 4th 443, 456-63, 165 P.3d 556, 563-68 (2007), held that, where employees assert unwaivable state statutory wage claims subject to an arbitration agreement that precludes any attempt to pursue those claims on a classwide basis, this preclusion *of a class procedure* is unenforceable as a matter of California public policy if the dispute resolution method specified in the employment contract—i.e., individual arbitration—could not as effectively vindicate the employee's substantive rights under the state's Labor Code.

Gentry held that applying this vindication of state public policy defense to invalidate class arbitration waivers was not preempted by the FAA because the FAA permitted courts to limit the enforcement of arbitration procedures based on state public policy where those procedures "significantly undermine the ability of employees to vindicate" their state statutory rights. *Id.* at 465 & n.8, 165 P.3d at 569 & n.8.

6. *Sonic I.* In *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic I*), 51 Cal. 4th 659, 668-69, 679, 681 n.4, 247 P.3d 130, 133-34, 140-41, 142 n.4 (2011), the California Supreme Court concluded that an agreement to resolve disputes through arbitration impermissibly waived the "advantages" of certain procedures that California laws made available to employees who pursue state statutory wage claims in an administrative proceeding before the state Labor Commissioner's office. *Id.* at 671-72, 247 P.3d at 135.

Applying its vindication of state public policy defense, the California Supreme Court concluded that substituting arbitration as an alternative to the Labor Commissioner procedures violated California public policy and rendered the agreement unconscionable as written. *Id.* at 678-84, 686-87, 247 P.3d at 140-44, 145-46. Applying the reasoning of *Discover Bank* and *Gentry*, the court also held that this result was not preempted by the FAA. *Id.* at 687-95, 247 P.3d at 146-52.

II. IN *CONCEPCION* AND *ITALIAN COLORS*, THIS COURT CLARIFIED THE BROAD PREEMPTIVE SCOPE OF THE FAA, CRITICIZED STATE COURT EFFORTS TO RESIST ARBITRATION, AND REJECTED THE COST OF VINDICATING STATUTORY RIGHTS IN ARBITRATION AS A REASON FOR NOT ENFORCING CLASS ARBITRATION WAIVERS.

Concepcion explained that, under the FAA, parties may agree "to arbitrate *according to specific rules*" and courts must "enforce [those agreements] *according to their terms*." *Concepcion*, 131 S. Ct. at 1745, 1748-49 (emphases added). Congress was careful to temper the FAA's mandate to respect parties' freedom of contract by including in the FAA a saving clause that preserves generally applicable contract defenses from preemption. *Id.* at 1748.

But even a defense that a state court characterizes as generally applicable to all contracts is preempted by the FAA if the defense "stand[s] as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1747-48. When, as a practical matter, a nominally arbitration-neutral contract defense disproportionately invalidates arbitration agreements, the defense erects a barrier to the FAA's objective of allowing parties the freedom to structure contractual terms for dispute resolution—or not to contract at all if those terms are unacceptable. *See id.* (generally applicable state contract defenses are preempted by the FAA where they "disfavor[ ] arbitration" by having a "disproportionate impact" on arbitration agreements and frustrating the FAA's

"overarching purpose" of "ensur[ing] the enforcement of arbitration agreements according to their terms").

Concepcion applied these principles to hold that the FAA preempted the unconscionability standard adopted by the California Supreme Court in *Discover Bank*. *Id.* at 1746-53. This Court rejected the assertion that California's policy against exculpatory contracts—California's state law version of the vindication exception to the FAA—could override the FAA's principal objective of enforcing arbitration agreements according to their terms. *Concepcion* acknowledged that the FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" *Id.* at 1746. But *Concepcion* determined that where courts hold arbitration procedures to be "unconscionable or unenforceable as against public policy" *based on their "general principle of unconscionability or public-policy disapproval of exculpatory agreements,"* such state-law defenses "[i]n practice . have a disproportionate impact on arbitration agreements" even though they "presumably apply" to all contracts. *Id.* at 1747 (emphasis added). *Concepcion* therefore held that such state-law unconscionability or public policy standards are preempted by the FAA. *Id.* at 1747-48.

In short, *Concepcion* held *Discover Bank* to be preempted because *Discover Bank*'s unconscionability standard "allowed courts to ignore and refuse to enforce the clear terms of the parties' agreement, and instead employ a judicial policy judgment" that a procedure to which the parties did not contractually agree "would better promote the vindication of the parties' rights in certain cases." *Truly Nolen of Am. v.*

Superior Court, 208 Cal. App. 4th 487, 506, 145 Cal. Rptr. 3d 432, 445 (2012).

Some courts have suggested that *Concepcion* did not address whether the FAA prevents courts from refusing to enforce agreements to arbitrate statutory claims where the plaintiff could establish the agreed-upon arbitration procedures were insufficient to vindicate statutory rights. *See, e.g.*, *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 535-36 (S.D.N.Y. 2012), *rev'd*, 726 F.3d 290 (2d Cir. 2013). But this Court's intervening decision in *Italian Colors* confirmed that *Concepcion* addressed precisely that vindication rationale.

In *Italian Colors*, the defendants sought to compel arbitration of the plaintiffs' federal antitrust claims on an individual basis pursuant to the arbitration agreement's class arbitration waiver. *Italian Colors*, 133 S. Ct. at 2307-08. The Second Circuit held that this waiver was unenforceable under the vindication exception because evidence "establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating" their federal antitrust claims "would be prohibitive." *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 217-19 (2d Cir. 2012). The Second Circuit distinguished *Concepcion* on the ground that it dealt with the FAA's preemption of state-law defenses to arbitration rather than with a vindication analysis. *Id.* at 212-13.

This Court reversed and held that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Italian Colors*, 133 S.

Ct. at 2311. The Court thus rejected the notion that the vindication principle, if it exists at all, allows a court to invalidate a class arbitration waiver on the ground that it would be uneconomical for the plaintiff to proceed with her claims on an individual, rather than a class-wide, basis. *Id.* at 2310-11.

In rejecting the plaintiff's arguments under the vindication exception, this Court held that *Concepcion* "all but resolves this case" and expressly rejected the dissenting opinion's view that *Concepcion* did not involve the vindication rationale. *Id.* at 2312 & n.5. Moreover, while Justice Kagan's dissenting opinion disagreed with the majority's view that *Concepcion* dealt with a vindication analysis, even the dissent acknowledged that states could not circumvent the FAA's mandate based on a concern for the vindication of state law, explaining that the FAA has "no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law." *Id.* at 2320 (Kagan, J., dissenting).

III. SINCE *CONCEPCION*, STATE COURTS HAVE CONTINUED TO RESIST THE PREEMPTIVE EFFECT OF THE FAA.

In the years since this Court decided *Concepcion*, the California Supreme Court and other state high courts have continued to resist the FAA's preemptive mandate.

1. ***Sonic II.*** *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*), 57 Cal. 4th 1109, 311 P.3d 184 (2013)[2] addressed whether the plaintiff could "vindicate his right to recover unpaid wages" under California law and, in particular, "whether any barrier to vindicating such rights would make the arbitration agreement unconscionable or otherwise unenforceable . . . and, if so, whether such a rule would be preempted by the FAA." *Id.* at 1142, 311 P.3d at 200.

The California Supreme Court noted that, when an employee elects to pursue his state statutory right to recover unpaid wages before the Labor Commissioner rather than in court, state law affords the employee certain hearing and posthearing procedures that are designed to "reduc[e] the costs and risks of pursuing a wage claim in several ways." *Id.* at 1129, 311 P.3d at 191. The court held it appropriate to consider whether agreed-upon arbitration procedures fail to include these statutory procedures, and whether the absence of these procedures fails to "provide an employee with an accessible and affordable arbitrable forum for resolving wage disputes." *Id.* at 1146, 311 P.3d at 203.[3]

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[2] This Court vacated *Sonic I* and remanded for reconsideration in light of *Concepcion*. *See Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. __, 132 S. Ct. 496 (2011).

[3] The *Sonic II* court did not suggest that the arbitration agreement actually waived the employee's right to pursue unpaid wages. Instead, the court emphasized that the unconscionability inquiry focuses on whether the arbitral scheme, in failing to

(continued...)

The court insisted that this unconscionability standard survived FAA preemption even after *Concepcion* and *Italian Colors*. Citing *Armendariz*'s discussion of the vindication of state statutory rights, the majority maintained that the FAA allows state courts to refuse to enforce agreements to arbitrate state statutory claims where arbitration would not afford procedural benefits that plaintiffs would have received outside arbitration. *Id.* at 1150-52, 311 P.3d at 206-08 (citing *Armendariz*, 24 Cal. 4th at 98-99, 6 P.3d at 679-80, and *Mitsubishi Motors*, 473 U.S. at 626-28). The majority reasoned that those procedures would help "vindicate" a state statutory right. *Sonic II*, 57 Cal. 4th at 1155, 311 P.3d at 209.

Justice Chin's dissenting opinion emphasized that under *Concepcion* and its progeny, the FAA precludes state courts from refusing to enforce arbitration agreements based on a concern that arbitration procedures prevent vindication of state statutory rights. *See id.* at 1184-92, 311 P.3d at 230-36 (Chin, J., dissenting). Justice Chin also explained that the majority's decision impermissibly applied a state-law contract defense to an arbitration agreement based on the uniqueness of that agreement. *Id.* at 1190-91, 311 P.3d at 235. The *Sonic II* majority insisted that the FAA authorizes the vindication of state statutory

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(...continued)

provide these statutory procedures, "imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable" by creating "practical impediments to the use of arbitration to resolve wage disputes." *Id.* at 1148, 1168, 311 P.3d at 204, 219.

rights because courts have the power to create state law rules "uniquely in the context of arbitration." *Id.* at 1143, 311 P.3d at 201 (majority opinion). However, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot.'" *Concepcion*, 131 S. Ct. at 1747. Such an arbitration-specific rule is preempted by the FAA because it has "a disproportionate impact on arbitration agreements." *Id.*

By improperly applying a vindication rationale with a unique and disproportionate focus on arbitration, and grounding it on an unconscionability standard that is peculiar to arbitration, *Sonic II*'s development of a "unique rule" for arbitration agreements flouted *Concepcion*. *Sonic II*, 57 Cal. 4th at 1190, 311 P.3d at 235 (Chin, J., dissenting).

The unconscionability standard the California Supreme Court applies to arbitration agreements turns on whether the agreements are permeated with a certain "degree of unfairness." *Id.* at 1160, 311 P.3d at 213 (majority opinion). But California's assessment of whether an arbitration agreement is sufficiently fair embodies little more than a state *policy* judgment about the efficacy of arbitration in vindicating a plaintiff's rights.

The FAA precludes such state policy judgments concerning the fairness of contractually agreed-upon arbitration procedures. "[S]treamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

The FAA imposes a binding value judgment about the merits of enforcing arbitration agreements as written, which cannot be superseded by state public policy in the guise of an unconscionability defense. *See Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). "[T]here is nothing inherently unfair or oppressive about arbitration clauses." *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986).

Contrary to the California Supreme Court's pronouncement in *Sonic II*, state courts cannot evaluate arbitration agreements based on whether the arbitration process sufficiently resembles the advantageous litigation procedures from which one party may benefit under state law outside the arbitral forum, even if the court believes that this comparative analysis may be desirable to that party (invariably, the plaintiff as it turns out) for fairness reasons. *See Concepcion*, 131 S. Ct. at 1752-53; *see also Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 600 (6th Cir. 2013) (holding that arbitration procedure could not be found unconscionable so as to defeat FAA preemption, even though it was adhesive and one-sided, since "all of these things—the one-sided nature of the arbitration clause, and its adhesive nature—were also present" in *Italian Colors* yet this Court found the arbitration agreement there enforceable, "all of those concerns notwithstanding").

By definition, such a comparison test depends, improperly, on the uniqueness of arbitration. *See Ex parte McNaughton*, 728 So. 2d 592, 598-99 (Ala. 1998). "[T]he heart of the asserted unfairness is the disparity"

between arbitration and litigation outside the arbitral forum, and the supposed lack of fairness therefore improperly derives its meaning from the fact that an arbitration agreement is at issue. *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169 (10th Cir. 2014). Simply put, "just as the FAA preempts a state statute that is predicated on the view that arbitration is an inferior means of vindicating rights, it also preempts state common law—including the law regarding unconscionability—that bars an arbitration agreement because of the same view." *Id.* at 1167.

2. ***Iskanian.*** In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 362-66, 327 P.3d 129, 134-37 (2014), the California Supreme Court revisited its holding in *Gentry* that class waivers in mandatory employment arbitration agreements are unenforceable as against public policy where such waivers prevent the effective vindication of employees' unwaivable rights under state wage and hour laws. The court overruled *Gentry*, holding that "[u]nder the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers." *Id.* at 364, 327 P.3d at 136.

Nevertheless, the California Supreme Court went out of its way to reaffirm that "an arbitration process [must be] accessible, affordable, and consistent with fundamental attributes of arbitration" and that "the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration." *Id.* at 366, 327 P.3d at 137.

Although he concurred in the result, Justice Chin again disagreed with the majority's reaffirmance of the *Sonic II* standard because "an arbitration agreement may not be invalidated based on a court's subjective view that the agreement's waiver of the [Labor Commissioner] procedures and protections would render arbitration less 'effective for wage claimants' than a 'dispute resolution mechanism' that includes those procedures and protections." *Id.* at 393, 327 P.3d at 156 (Chin, J., concurring).

3. Other state court cases since *Concepcion*. Other state supreme courts have continued to resist and evade *Concepcion* since this Court decided that case in 2011. Indeed, this Court has itself twice had to summarily reverse state high courts that have flatly refused to apply the FAA as construed in *Concepcion*.

In *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __, 132 S. Ct. 1201 (2012) (per curiam), this Court summarily reversed a decision of the West Virginia Supreme Court of Appeals that refused to enforce an arbitration agreement. The plaintiffs in *Marmet* brought negligence and wrongful death actions against nursing homes in which their relatives had died, and the state high court refused to enforce agreements requiring that such claims be arbitrated. *Id.* at 1202-03. The state supreme court held that "'Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for

members of the public.'" *Id.* at 1203. In reversing that decision, this Court reiterated that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Id.* at 1203-04.

Shortly after *Marmet*, this Court summarily reversed another state high court decision refusing to compel arbitration, this time from Oklahoma. *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. __, 133 S. Ct. 500, 501 (2012) (per curiam). In that case, the Oklahoma Supreme Court refused to enforce an arbitration clause in a noncompetition agreement between Nitro-Lift and two former employees, holding that Oklahoma law embodying a state public policy against noncompetition agreements trumped the FAA's mandate that an arbitrator decide whether the noncompetition agreements were valid. *Id.* at 501-02. In reversing, this Court emphasized that "State courts rather than federal courts are most frequently called upon to apply the [FAA] , including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Id.* at 501. The Oklahoma Supreme Court disregarded the FAA in "assum[ing] the arbitrator's role by declaring the noncompetition agreements null and void"; "the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" *Id.* at 503.

Other state supreme court opinions have likewise continued resisting *Concepcion* in less obvious,

but no less troubling, ways. One example of this trend is *Schnuerle v. Insight Communications Co.*, 376 S.W.3d 561, 573 (Ky. 2012), where the Kentucky Supreme Court applied *Concepcion* to an arbitration agreement between a broadband Internet company and its subscribers that contained a class arbitration waiver. *Id.* at 565-66. While the state high court reluctantly held that *Concepcion* compelled it to enforce the class waiver under the FAA, *id.* at 569, the court imposed a significant caveat:

> *Concepcion* does not disturb the basic principle that an arbitration clause is not enforceable if it fails to provide plaintiffs with an adequate opportunity to vindicate their claims. Accordingly, arbitration clauses certainly may continue to be struck down as unconscionable if their terms strip claimants of a statutory right, which cannot be vindicated by arbitration, because, for example, the arbitration costs on the plaintiff are prohibitively high.

Id. at 573. Thus, the Kentucky Supreme Court has preserved the effective vindication rationale as applied to state law that this Court has long condemned. *See Perry*, 482 U.S. at 489-90; *Mitsubishi Motors*, 473 U.S. at 628; *Southland Corp. v. Keating*, 465 U.S. 1, 10-11, 16 & n.11 (1984).

Similarly, in *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash. 2d 598, 603-10, 293 P.3d 1197, 1199-1203 (2013), the Washington Supreme

Court narrowly construed *Concepcion* in invalidating an arbitration clause in a debt adjustment contract. *Gandee* held that the venue, fee-shifting, and statute of limitations provisions of the arbitration clause were unconscionable because they thwarted "the [state] legislature's intent to encourage consumers to vindicate their rights." *Id.* at 605, 293 P.3d at 1201. In analyzing whether this outcome was preempted by the FAA after *Concepcion*, the Washington Supreme Court construed *Concepcion* as limited to its facts, *id.* at 609-10, 293 P.3d at 1202-03, so that "*Concepcion* provides no basis for preempting [Washington's] relevant case law nor does it require the enforcement of Freedom's arbitration clause" *id.* at 610, 293 P.3d at 1203.

In *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490-91, 493-94 (Mo. 2012), the Missouri Supreme Court also sidestepped *Concepcion* in striking down as unconscionable an arbitration clause containing a class waiver in a car title loan agreement. The Missouri high court explained that "[b]ecause the purpose of the [FAA] is to ensure efficient dispute resolution, the analysis in *Concepcion* assumes the availability of a practical, viable means of individualized dispute resolution through arbitration." *Id.* at 494. Since the plaintiff had introduced evidence that no lawyer would take her case to individual arbitration because of the prohibitive costs involved, the court concluded that she could not vindicate her state statutory rights in arbitration and that the FAA therefore did not require enforcement of the arbitration clause. *Id.* at 493-94. This result flouts the decisions in *Concepcion* and *Italian Colors*. *See Italian Colors*, 133 S. Ct. at 2312 n.5 ("[T]he FAA's command to enforce arbitration

agreements trumps any interest in ensuring the prosecution of low-value claims."); *Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."). Indeed, the dissenting opinion condemned the majority for "engag[ing] in intellectual gymnastics to create 'life after *Concepcion*.'" *Brewer*, 364 S.W.3d at 504 (Price, J., dissenting).

The Montana Supreme Court refused to enforce an arbitration clause in a payday loan agreement based on pre-*Concepcion* case law requiring arbitration clauses to clearly and conspicuously explain the consequences of arbitrating because arbitration inherently involves the waiver of fundamental rights to jury trial and access to the courts. *Kelker v. Geneva-Roth Ventures, Inc.*, 369 Mont. 254, 259, 303 P.3d 777, 781 (2013). While the Montana high court portrayed its "clear and conspicuous" test as generally applicable to all contracts, this state-law contract defense is preempted by the FAA because it "appl[ies] only to arbitration [and] derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746.[4]

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[4] The Ninth Circuit has disagreed with the Montana Supreme Court on this point and held that its "reasonable expectations/fundamental rights rule runs contrary to the FAA as interpreted by *Concepcion* because it disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013).

The New Jersey Supreme Court has followed the same erroneous course. In *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 446-48, 99 A.3d 306, 315-16 (2014), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Jan. 21, 2015) (No. 14-882), that court invalidated an arbitration clause in a contract for debt adjustment services because it did not provide the consumer sufficiently clear and unambiguous notice that she was giving up her right to have her statutory claims adjudicated in court. The court explained that "because arbitration involves a waiver of the right to pursue a case in a judicial forum, 'courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.'" *Id.* at 442-43, 99 A.3d at 313. As the Third Circuit held in a similar case, the New Jersey Supreme Court was wrong because "applying a heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA." *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 224 (3d Cir. 2008).

While these cases represent only a handful of the many state court cases that have sought to evade the FAA's preemptive mandate after *Concepcion*, they show that the problem of enforcement of the FAA in state courts persists—particularly in California—and requires this Court's ongoing supervision. As we explain in the next section, the California Court of Appeal's decision in this case is but another example of this trend.

IV. THE CALIFORNIA COURT OF APPEAL'S DECISION IN THIS CASE IS SIMPLY THE LATEST ATTEMPT TO EVADE *CONCEPCION* AND THE FAA.

The court below continued the trend of state court evasion of FAA preemption, this time under the guise of contract interpretation. The result is of a piece with prior state court cases refusing to apply arbitration clauses as written and continues "the judicial hostility towards arbitration that prompted the FAA [which has] manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Concepcion*, 131 S. Ct. at 1747.

DIRECTV's customer agreement contained an arbitration clause that included a class arbitration waiver. Pet. App. 4a-5a. That provision concluded with the following sentence: "'If, however, the law of your [i.e., the customer's] state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [i.e., the entire arbitration clause] is unenforceable.'" Pet. App. 5a. Imburgia sought to bring a class action against DIRECTV in state court alleging that DIRECTV violated various state consumer protection laws by improperly charging early termination fees to its customers. Pet. App. 3a. After the state trial court denied DIRECTV's motion to compel arbitration, the California Court of Appeal affirmed by applying state law preempted by the FAA. Pet. App. 3a-4a.

The Court of Appeal reasoned that the arbitration clause's reference to "the law of your state" meant "the law of your state without considering the

preemptive effect, if any, of the FAA"—i.e., California law before *Concepcion*. Pet. App. 8a. In doing so, the court relied on contractual interpretation principles under state law (e.g., the specific controls the general, contract language should be construed against the drafter) and rejected contrary holdings of federal courts. Pet. App. 8a-15a; *but see Nitro-Lift*, 133 S. Ct. at 504 ("There is no general-specific exception to the Supremacy Clause."). In particular, the court rejected a Ninth Circuit opinion construing the same provision in DIRECTV's arbitration clause in exactly the opposite way. Pet. App. 12a-15a; *see Murphy*, 724 F.3d at 1225-28. The Ninth Circuit held in *Murphy* that, for purposes of interpreting the phrase "the law of your state" in DIRECTV's arbitration clause, the FAA (as construed in *Concepcion*) "*is* the law of California and of every other state" and that "[i]t follows that, under the doctrine of preemption, the *Discover Bank* rule is not, and indeed never was, California law." *Murphy*, 724 F.3d at 1226. The Ninth Circuit concluded that "[p]laintiffs' contention that the parties intended for state law to govern the enforceability of DIRECTV's arbitration clause, even if the state law in question contravened federal law, is nonsensical." *Id.* The Court of Appeal here brushed *Murphy* aside as "unpersuasive." Pet. App. 13a.

The California Court of Appeal fundamentally erred. It is bedrock constitutional law that "the incorporation of state law does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of

every State as its own local laws and Constitution.'" *de la Cuesta*, 458 U.S. at 157 (quoting *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880)); *see also Testa v. Katt*, 330 U.S. 386, 390-92 (1947). There is no such thing as California law shorn of the FAA's preemptive effect after *Concepcion*. Federal law (including *Concepcion*'s interpretation of the FAA) is the law of California and always has been, and the reference to "the law of your state" in the DIRECTV arbitration clause incorporates the effect of FAA preemption. No matter how much California courts may wish to apply the anti-arbitration policy animating California law prior to *Concepcion* to invalidate arbitration clauses containing class action waivers, they cannot "opt out" of the Supremacy Clause.

The Court of Appeal's opinion in this case is but the latest example of a regrettable trend this Court noted in *Concepcion*—that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Concepcion*, 131 S. Ct. at 1747. The transparency of the Court of Appeal's error is striking, confirming that the judicial hostility to arbitration that the FAA was enacted to extinguish is still alive and well in California.

Twice in recent years, this Court has been forced to summarily reverse state court rulings refusing to obey the Supremacy Clause and apply the FAA to invalidate state laws that are preempted by the FAA after *Concepcion*. *See Nitro-Lift*, 133 S. Ct. at 503 ("'It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'"); *Marmet*, 132 S. Ct. at 1202

("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."). This Court should again reverse in this case and instruct the lower court and other state courts to follow the Supremacy Clause and the policy of the FAA by enforcing arbitration agreements as written, even when this leads to a result at odds with state public policy, state unconscionability doctrine, or other principles of state law.

CONCLUSION

For the foregoing reasons and for the reasons stated in DIRECTV's opening brief on the merits, this Court should reverse the California Court of Appeal's decision and remand for further proceedings not inconsistent with this Court's opinion.

Respectfully submitted,

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No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, *et al.*,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE DECISION BELOW IMPERMISSIBLY CONFLICTS WITH THE FAA AS CONSTRUED BY THIS COURT IN *CONCEPCION*	9
A. The Strong Federal Policy Favoring Arbitration Requires That Agreements To Arbitrate Be Enforced In Accordance With Their Terms, And Doubts Concerning Arbitrability Should Be Resolved In Favor Of Arbitration	9
B. An Arbitration Agreement Containing A Class Action Waiver Is Enforceable Under The FAA, And The FAA Preempts State Requirements To The Contrary	12
C. The Decision Below Improperly Requires That Enforceability Questions Be Governed By State Law, Rather Than The FAA	15
1. The California Court of Appeal erred in disregarding *Concepcion* and applying preempted state law to invalidate an arbitration agreement governed by the FAA	17

TABLE OF CONTENTS—Continued

Page

2. Applying *Concepcion*, the Ninth Circuit has construed the identical agreement to be valid and enforceable, notwithstanding its class waiver provision 18

II. PERMITTING STATE COURTS TO CIRCUMVENT SUPREME COURT PRECEDENT HOLDING THAT ARBITRATION AGREEMENTS, INCLUDING THOSE CONTAINING CLASS ACTION WAIVERS, MUST BE ENFORCED ACCORDING TO THEIR TERMS UNDERMINES UNIFORM ARBITRATION PROGRAMS, PARTICULARLY IN THE EMPLOYMENT CONTEXT 20

A. Imposing Class Action Procedures Even Where The Underlying Agreement Precludes Such Procedures Fundamentally Would Alter The Expectations Of Both Employers And Employees By Imposing The Very Costs And Burdens Sought To Be Avoided 20

B. State Rules That Place Greater Restrictions On Agreements To Arbitrate Than Exist For Other Contracts Undermine Employers' Efforts To Develop And Enforce Uniform ADR Procedures 25

CONCLUSION 27

TABLE OF AUTHORITIES

FEDERAL CASES — Page(s)

14 Penn Plaza LLC. v. Pyett, 556 U.S. 247 (2009) 3, 12, 22

American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) 3, 13, 14, 15

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) ..... *passim*

CarMax Auto Superstores California, LLC v. Fowler, 134 S. Ct. 1277 (2013) 3, 14

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 3, 10, 21

CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) 7, 10

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) 11

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 15

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) 3, 10

Fener v. Operating Engineers Construction Industries & Miscellaneous Pension Fund (LOCAL 66), 579 F.3d 401 (5th Cir. 2009) 25

Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003) 3

Green Tree Financial Corp.- Alabama v. Randolph, 531 U.S. 79 (2000) 3, 10

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 3, 7, 10, 11

TABLE OF AUTHORITIES—Continued

Page(s)

Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576 (2008) 10

In re American Express Merchants' Litigation, 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom. American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) 14

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 11

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1984) 11, 20

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 7, 8, 10, 16

Murphy v. DIRECTV, Inc., 724 F.3d 1218 (9th Cir. 2013) 6, 8, 18, 26

Nitro-Lift Technologies, LLC v. Howard, 133 S. Ct. 500 (2012) 10, 16

Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013) 3

Perry v. Thomas, 482 U.S. 483 (1987) 15

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 9, 10

Rutstein v. Avis Rent-A-Car System, Inc., 211 F.3d 1228 (11th Cir. 2000) 25

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010) ... 3, 10, 12, 24

TABLE OF AUTHORITIES—Continued

Page(s)

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 24

Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998) 3

STATE CASES

Brown v. Ralphs Grocery Co., 197 Cal. App. 4th 489 (Cal. Ct. App. 2011) 5, 6

Cohen v. DIRECTV, Inc., 48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006), *overruled by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) 5

Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *overruled by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) 5, 12

Imburgia v. DIRECTV, Inc., 170 Cal. Rptr. 3d 190 (Cal. Ct. App. 2014) 26

FEDERAL STATUTES

Federal Arbitration Act,

9 U.S.C. §§ 1-16 ..... *passim*

9 U.S.C. § 2 11

OTHER AUTHORITIES

Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813 (2008) 21, 22

TABLE OF AUTHORITIES—Continued

Page(s)

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Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press 1997) 23

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783 (2008) 23

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---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.[1]

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[1] The parties have consented to the filing of this brief. Counsel for *amicus curiae* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices.

EEAC member companies, most of which conduct business in numerous states, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. A number of EEAC's members thus have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based arbitration.

The California Court of Appeal below refused to enforce a consumer arbitration agreement governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, because it contained a class action waiver provision,

which it construed to be unenforceable under California state law. Although arising in the consumer context, the issues in this case also impact uniform use of mandatory arbitration agreements generally, and class action waivers specifically, in the employment arbitration context.

EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court.[2] EEAC thus is familiar with the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner DIRECTV, Inc. (DIRECTV) is a provider of digital satellite television programming and services. J.A. 60. The relationship between DIRECTV and each of its customers is governed by a Consumer Agreement (Agreement), which requires that any consumer-related dispute regarding programming, service, or the Agreement itself be submitted to

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[2] *See, e.g.*, *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *14 Penn Plaza LLC. v. Pyett*, 556 U.S. 247 (2009); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.- Ala. v. Randolph*, 531 U.S. 79 (2000); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

binding arbitration. Pet. App. 4a. Section 9 of the Agreement further provides:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

Pet. App. 5a.

The Agreement also contains a choice of law provision in Section 10(b), which provides:

> Applicable Law. The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. *Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.*

Id. (emphasis added). Finally, Section 10(d) of the Agreement states:

> [I]f any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable.

J.A. 129.

Respondents Amy Imburgia and Kathy Grenier brought an action in the California Superior Court for Los Angeles County on behalf of themselves and a class of similarly situated consumers alleging that they improperly were assessed early contract termination fees in violation of various California laws. Pet. App. 17a. They moved for class certification, and on April 20, 2011, the trial court granted the motion in part. Pet. App. 18a.

On May 17, 2011, DIRECTV moved to stay or dismiss the action, decertify the class, and compel arbitration of the claims in light of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which this Court decided on April 27, 2011. Pet. App. 4a. In its motion, DIRECTV contended that it had not moved to compel arbitration earlier because, in an unrelated case decided several years before the instant action was filed, the California Court of Appeal had held that the arbitration provision contained in DIRECTV's Agreement was unenforceable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *overruled by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Pet App. 4a. *See Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006), *overruled by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Discover Bank* held that class waivers in consumer contracts generally are unconscionable and thus unenforceable. Pet. App. 4a. Until *Concepcion* was decided, DIRECTV had believed that any motion to compel arbitration under its Agreement in California would have been futile. *Id.*

The California trial court denied DIRECTV's motion to compel arbitration, holding the arbitration agreement unenforceable under *Brown v. Ralphs Grocery*

Co., 197 Cal. App. 4th 489 (Cal. Ct. App. 2011), a case involving labor-related representative actions under California's Private Attorney General Act of 2004 (PAGA). Pet. App. 19a. In *Brown*, the California Court of Appeal held, in part, that the FAA did not preempt state law invalidating a contractual waiver of an employee's right to pursue a representative action under the PAGA. 197 Cal. App. 4th at 494.

Following DIRECTV's appeal, the California Court of Appeal affirmed the trial court's decision on different grounds, focusing on the clause in the Agreement providing that "if the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." Pet. App. 15a. Relying on principles of contract interpretation, the court reasoned that "the law of your state" meant California state law without regard to the preemptive effect of the FAA. *Id.* The court then determined that the state law of California rendered the class action waiver unenforceable. Pet. App. 6a. It concluded that because "[t]he class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable." Pet. App. 15a.

In doing so, the Court of Appeal expressly acknowledged that its decision conflicts with *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013), in which the Ninth Circuit held that the very same language in the same arbitration agreement "'is enforceable under *Concepcion*,' which preempts any state law to the contrary." Pet. App. 13-14 (quoting *Murphy*, 724 F.3d at 1228).

DIRECTV unsuccessfully petitioned the California Supreme Court for review. Pet. App. 1a. DIRECTV

thereafter filed a petition for a writ of certiorari, which this Court granted on March 23, 2015.

SUMMARY OF ARGUMENT

This Court consistently has held that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, establishes a "liberal federal policy favoring arbitration agreements ...." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (superseded by statute on other grounds), and "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

"A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results[.]'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (citation omitted). To that end, the FAA affords parties the discretion to design their own arbitration processes tailored to the particular type of dispute at issue, including "limit[ing] *with whom* a party will arbitrate its disputes ...." *Id.* (citation omitted). In furtherance of that "prime objective," this Court has made clear that class arbitration procedures properly can be waived in a valid arbitration agreement governed by the FAA, in part because "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751.

Disregarding the well-established principle that disputes related to arbitrability should be construed in favor of arbitration, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), the California Court of Appeal held that the reference to state law in

the Arbitration Agreement mandated the application of anti-class waiver state law otherwise preempted by the FAA, even though the Agreement itself expressly provided that the arbitration provision was to be governed by the FAA. As a result, the court determined that the arbitration agreement was unenforceable.

The lower court's decision simply cannot be reconciled with the well-established "federal substantive law of arbitrability," which governs "any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. In particular, it conflicts with the principle outlined by this Court in *Concepcion* that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

As the Ninth Circuit properly reasoned in construing the very same provisions from the same Agreement, "[a] contract cannot be unenforceable under state law if federal law requires its enforcement, because federal law is 'the supreme Law of the Land' ...." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013) (quoting U.S. Const. art. VI, cl.2.). Thus, "Section 9 of the Customer Agreement provides only that the arbitration agreement will be unenforceable if the 'law of your state' disallows class waivers, which California law does not – and could not – under the FAA as interpreted in *Concepcion*." *Id.*

Although arising in the consumer context, the decision below easily could be construed by a California court also to apply in the employment arbitration context. Compelling class procedures where the parties have not so agreed and despite an express class action waiver in an arbitration agreement imposes

the very cost burdens and procedural complexities that both employers and employees, by agreeing to arbitrate, seek to avoid. Moreover, allowing the lower court's decision to stand would undermine the uniform application of multistate employers' ADR procedures, subjecting employers to the prospect of having to litigate, from court to court, the enforceability of arbitration agreements containing class action waiver provisions that reference state law, a common practice. And for the substantial number of employers operating in California, the conflict between the Court of Appeal and the Ninth Circuit raises the very real concern that enforceability of their arbitration agreements containing class action waivers in California will depend on whether a state or federal court considers the issue.

ARGUMENT

I. THE DECISION BELOW IMPERMISSIBLY CONFLICTS WITH THE FAA AS CONSTRUED BY THIS COURT IN *CONCEPCION*

A. The Strong Federal Policy Favoring Arbitration Requires That Agreements To Arbitrate Be Enforced In Accordance With Their Terms, And Doubts Concerning Arbitrability Should Be Resolved In Favor Of Arbitration

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490

U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This Court repeatedly has reaffirmed the federal policy favoring arbitration, recognizing that the FAA was enacted in an effort to curb "widespread judicial hostility to arbitration agreements," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011), and "to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

Indeed, "the overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. Section 2 of the FAA is the "primary substantive provision of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (superseded by statute on other grounds). This section has been described as "reflecting both a 'liberal federal policy favoring arbitration,'" *Concepcion*, 131 S. Ct. at 1745 (citation omitted), and the "'fundamental principle that arbitration is a matter of contract.'" *Id.* (citation omitted); *see also Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012).

Among the FAA's foundational principles is "that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (citation omitted). Because "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties

had entered,' [courts must] 'rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1984) (citation omitted). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted).

To that end, this Court has made clear that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of wavier, delay, or a like defense to arbitrability." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995) (citation omitted); *see also Gilmer*, 500 U.S. at 26 ("'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration'") (citation omitted).

Indeed, the sole exception to the general rule favoring arbitration is that the FAA allows an arbitration agreement to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court recognized in *Concepcion*, "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." 131 S. Ct. at 1746 (citations omitted). Moreover, "[a]lthough § 2's saving clause preserves generally applicable

contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 1748.

B. An Arbitration Agreement Containing A Class Action Waiver Is Enforceable Under The FAA, And The FAA Preempts State Requirements To The Contrary

Parties to arbitration agreements often agree to streamlined procedural mechanisms. They may agree to "limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes." *Concepcion*, 131 S. Ct. at 1748-49 (citations omitted). As this Court observed in *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" 500 U.S. at 31 (citation omitted); *see also Stolt-Nielsen*, 559 U.S. at 685 ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution," noting that "the relative benefits of class-action arbitration are much less assured ...."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-66 (2009) ("The decision to resolve ... claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace ... discrimination; it waives only the right to seek relief from a court in the first instance").

This Court has made clear that the ability to bring a class action is one of the procedural mechanisms that properly can be waived by the parties to a valid arbitration agreement under the FAA. In *Concepcion*, the Court held that California's *Discover Bank* rule,

which conditioned the enforceability of an arbitration agreement on the availability of classwide arbitration procedures, was "preempted by the FAA," 131 S. Ct. at 1753, "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citation omitted). It reasoned that "[r]equiring the availability of classwide arbitration ... creates a scheme inconsistent with the FAA," *id.* at 1748, because it "interferes with fundamental attributes of arbitration." *Id.* "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* at 1749. In contrast, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751.

Building on the principles established in *Concepcion*, the Court in *Italian Colors* held that a party's agreement to forgo class arbitration must be enforced, even if the parties would incur prohibitive costs if compelled to arbitrate on an individual basis. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). The Second Circuit had refused to enforce a commercial arbitration agreement containing a class waiver clause, concluding that the plaintiff presented sufficient evidence that the "*only economically feasible* means [of pursuing their antitrust claims] is *via a class action*." *Id.* at 2311 n.4. In so holding, the Second Circuit found *Concepcion* inapplicable, as it never reached the specific question "whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory

rights." *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 212 (2d Cir. 2012), *rev'd sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

Reversing the Second Circuit, this Court declared that its decision in *Concepcion* "all but resolves this case." *Italian Colors*, 133 S. Ct. at 2312. Relying on *Concepcion*'s determination that a law conditioning enforcement of arbitration on the availability of class procedure "interfere[s] with fundamental attributes of arbitration" in violation of the FAA, *id.* (quoting *Concepcion*, 131 S. Ct. at 1748), the Court reasoned:

> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

Id. at 2312.[3]

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[3] Last term, this Court vacated a ruling of the California Court of Appeal that refused to enforce an arbitration agreement that contained a provision requiring employees to arbitrate disputes individually rather than on a class basis, remanding for reconsideration in light of *Italian Colors*. *See CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014).

Thus, as this Court made clear in *Concepcion* and *Italian Colors*, a state law rule making an otherwise valid arbitration agreement unenforceable simply because it contains a waiver of classwide arbitration is incompatible with the FAA.

C. The Decision Below Improperly Requires That Enforceability Questions Be Governed By State Law, Rather Than The FAA

This Court long has held that no state may hold private agreements to arbitrate to a higher standard of enforceability than generally is applicable to other private contracts without running afoul of the FAA. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the FAA]"); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (state law that imposed a special notice requirement for all contracts subject to arbitration is "inconsonant with, and is therefore preempted by, the [FAA]"); *Concepcion*, 131 S. Ct. at 1753 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"). Whether statutorily or judicially created, a state law that imposes greater burdens on the enforceability of mandatory agreements to arbitrate than apply to other types of contracts thus is incompatible with, and therefore preempted by, the FAA.

It also is well established that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. In *Nitro-Lift Technologies, L.L.C. v. Howard*, this Court noted that state, as opposed to federal, courts are more frequently called upon to apply the federal substantive law of the FAA, "including the Act's national policy favoring arbitration [, and, therefore, i]t is a matter of great importance ... that state supreme courts adhere to a correct interpretation of the legislation." 133 S. Ct. 500, 501 (2012) (*per curiam*).

In *Nitro-Lift*, this Court reversed the Oklahoma Supreme Court's determination that notwithstanding the "'[U.S.] Supreme Court cases on which the employers rely,' the 'existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement.'" *Id.* at 502 (citation omitted). In doing so, the Court observed:

> The Oklahoma Supreme Court's decision disregards this Court's precedents on the FAA. That Act, which "declare[s] a national policy favoring arbitration," provides that a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *It is well settled that "the substantive law the Act created [is] applicable in state and federal courts."*
>
> ***

> [T]he Oklahoma Supreme Court *must abide by the FAA, which is "the supreme Law of the Land," U.S. Const., Art. VI, cl.2, and by the opinions of this Court interpreting that law.* It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. Our cases hold that the FAA forecloses precisely this type of "judicial hostility towards arbitration."

Id. at 503-04 (emphasis added) (citations omitted).

1. The California Court of Appeal erred in disregarding *Concepcion* and applying preempted state law to invalidate an arbitration agreement governed by the FAA

The arbitration provision set forth in the Agreement here provides that "[i]f ... the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable." Pet. App. 5a. At the same time, it also expressly provides that the Section 9 arbitration provision "*shall be governed by the Federal Arbitration Act.*" *Id.* (emphasis added).

In determining that the arbitration agreement was unenforceable because it contained a class action waiver, the California Court of Appeal relied upon a now-discredited state rule that class action arbitration waivers are unenforceable – the very rule that this Court in *Concepcion* held was "preempted by the FAA," 131 S. Ct. at 1753, "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citation omitted). *See also id.* at 1748 ("Although § 2's

saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"). The lower court's decision thus directly conflicts with the substantive federal law created by the FAA, as interpreted by this Court in *Concepcion*.

As this Court recognized in *Concepcion*, "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Id.* at 1752 (citation omitted). The parties here mutually agreed that the FAA governs their arbitration agreement, and the agreement should have been enforced in accordance with its terms, as required by the FAA and *Concepcion*.

2. Applying *Concepcion*, the Ninth Circuit has construed the identical agreement to be valid and enforceable, notwithstanding its class waiver provision

The Ninth Circuit had occasion to construe the very same arbitration agreement at issue here in *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013). There, in opposing a motion to compel individual arbitration, the plaintiffs contended that because the contract became effective prior to this Court's decision in *Concepcion*, "the law of [California] would [have found] this agreement to dispense with class arbitration procedures unenforceable." *Id.* at 1225.

In rejecting the plaintiffs' contention, the Ninth Circuit aptly observed that:

> Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements

> that ban class procedures, *is* the law of California and of every other state. The Customer Agreement's reference to state law "does not signify the inapplicability of federal law, for 'a fundamental principle in our system of complex national polity' mandates that 'the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.'" *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 (1982). ...
>
> It follows that, under the doctrine of preemption, the *Discover Rule* is not, and indeed never was, California law. Simply put, "state law is *nullified* to the extent that it actually conflicts with federal law." *de la Cuesta*, 458 U.S. at 153 (emphasis added). Thus, Plaintiff's contention that the parties intended for state law to govern the enforceability of [DIRECTV's] arbitration clause, even if the state law in question contravened federal law, is nonsensical. A contract cannot be unenforceable under state law if federal law requires its enforcement, because federal law is "the supreme Law of the Land ..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2. Section 9 of the Customer Agreement provides only that the arbitration agreement will be unenforceable if the "law of your state" disallows class waivers, which California law does not – and could not – under the FAA as interpreted in *Concepcion*.

Id. at 1226 (footnote omitted).

The Ninth Circuit properly construed the Agreement in accordance with the FAA, whereas the California Court of Appeal did not. As a result, Petitioner has been placed in an untenable situation

in which the same FAA-governed arbitration agreement referencing state law and containing a class action waiver will be interpreted two different ways, depending on whether the agreement is challenged in California state or federal court.

Like the state rule invalidated in *Concepcion*, the Court of Appeal's interpretation of the Agreement in this case is contrary to the FAA and this Court's FAA jurisprudence. Accordingly, the decision below should be reversed.

II. PERMITTING STATE COURTS TO CIRCUMVENT SUPREME COURT PRECEDENT HOLDING THAT ARBITRATION AGREEMENTS, INCLUDING THOSE CONTAINING CLASS ACTION WAIVERS, MUST BE ENFORCED ACCORDING TO THEIR TERMS UNDERMINES UNIFORM ARBITRATION PROGRAMS, PARTICULARLY IN THE EMPLOYMENT CONTEXT

A. Imposing Class Action Procedures Even Where The Underlying Agreement Precludes Such Procedures Fundamentally Would Alter The Expectations Of Both Employers And Employees By Imposing The Very Costs And Burdens Sought To Be Avoided

"[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi*, 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and those containing class action waivers

specifically, is particularly misplaced in the employment context, where individual arbitration offers significant advantages to employers and employees alike. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001).

As this Court observed in *Circuit City*, there are "real benefits to the enforcement of arbitration provisions ... [in] the employment context." *Id.* In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.* at 123. *See generally Concepcion*, 131 S. Ct. at 1751 ("'In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes'") (citation omitted). Imposing class action procedures on parties who expressly agreed to waive such procedures in favor of bilateral arbitration fundamentally changes the nature of dispute resolution to such a degree that it becomes a serious burden on the parties, rather than a means of resolving their dispute efficiently and in a less costly manner.

The advantages of arbitration, and bilateral arbitration in particular, are considerable in the employment context. Arbitration offers lower-level employees an opportunity to bring claims that would not be economically viable to pursue in court. "The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims." Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility:*

Empirical Evidence, 41 U. Mich. J.L. Reform 813, 840 (2008). As one commentator has observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 2 (2003). Indeed, parties generally favor arbitration precisely because of the economics of the dispute resolution. *See 14 Penn Plaza*, 556 U.S. at 257.

The relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle:

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is

> able to engage an attorney on a contingency fee basis ... the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* 153-54 (Cornell Univ. Press 1997). Similarly:

> The vast majority of ordinary, lower-and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 810 (2008). As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales, *supra*, at 159 (footnote omitted); *see Concepcion*, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. ... And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution") (citations omitted).

The significant benefits that employees derive from arbitration would be lost if they are forced instead to submit to complex, class action litigation (or risk

having their rights adjudicated in their absence) despite having agreed to waive both the judicial forum and class action procedures. Unlike the typical two-party arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend, especially where each class member is entitled to substantial individual damages, including compensatory and punitive damages. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). Indeed, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 130 S. Ct. at 1775. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties ... thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purposes to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation ....

Id. (citations omitted).

Furthermore, the significantly higher costs and exposure posed by class actions place enormous pressure on defendants to settle rather than run even a small risk of catastrophic loss. It is what this Court in

Concepcion described as "the risk of 'in terrorem' settlements ...." 131 S. Ct. at 1752, and lower courts have called "judicial blackmail;" *i.e.*, "the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1240 n.21 (11th Cir. 2000) (emphasis added); *see also Fener v. Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund (LOCAL 66)*, 579 F.3d 401, 406 (5th Cir. 2009) (referring to the pressure on defendants to settle class actions as "'judicial blackmail'") (citation and footnote omitted). Invalidating an arbitration agreement simply because it precludes class arbitration would defeat one of the most mutually advantageous purposes of arbitration – lower-cost resolution of disputes. *Concepcion*, 131 S. Ct. at 1751. The decision below does just that, creating a strong disincentive against the adoption of employment arbitration programs.

B. State Rules That Place Greater Restrictions On Agreements To Arbitrate Than Exist For Other Contracts Undermine Employers' Efforts To Develop And Enforce Uniform ADR Procedures

As illustrated here, California courts continue to subject mandatory arbitration agreements generally – and those containing class action waivers specifically – to higher enforceability standards than are imposed upon other types of contracts. In the instant case, the California Court of Appeal capitalized on the state law provision in the Agreement to impose its policy preference for class arbitration, in complete disregard of governing substantive federal law.

Arbitration agreements often include reference to the application of the state law of a particular jurisdiction. Should such a reference trump federal substantive law, the FAA's preemptive effect would be nullified.

As a consequence of the decision below, multistate employers now are faced with the real possibility that their alternative dispute resolution programs containing class action waivers will not be enforced uniformly for all of their employees. Not only does the potential exist for uneven enforcement of an arbitration program *between* states, but also within the state of California itself. In particular, in California – a large and populous state with a significant business presence – whether or not a class action waiver in an FAA-governed arbitration agreement that incorporates California law is enforceable now will depend on whether a federal or a state court is asked to consider its enforceability. *Compare Murphy*, 724 F.3d at 1226-28 *with Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 198 (Cal. Ct. App. 2014).

The prospect of having to litigate, from court to court, the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish binding arbitration programs, and significantly undercuts the strong federal policy, as repeatedly endorsed by this Court, favoring private arbitration of employment disputes.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeal below should be reversed.

Respectfully submitted,

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DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, et al.,

Respondents.

On Writ Of Certiorari To The California Court Of Appeal, Second District

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Court Should Affirm The Decision Below Because The Parties Bargained For Application Of State Law, And The FAA's Primary Purpose Is The Enforcement Of Arbitration Agreements According To Their Terms, Including Terms Incorporating State Law 3

A. The FAA's Preemption Doctrine Does Not Operate Without Consideration Of The Parties' Agreement, The Foundation Of All Arbitration 9

B. Enforcing The Parties' Agreement To Incorporate State Law Advances Party Autonomy, Promotes Federalism, And Improves Dispute Resolution In Both Arbitration And The Courts 16

II. The Court Should Not Apply *Concepcion*'s Preemption Test In This Case 22

A. *Concepcion* Is Inapplicable Because The Parties In *Concepcion* Did Not Bargain For State Law To Govern The Enforceability Of The Class Waiver 23

TABLE OF CONTENTS – Continued

Page

B. *Concepcion* Is Inapplicable Because *Concepcion* Addressed An Unrelated, Manipulable State Rule Not At Issue Here 24

C. The Court Should Be Hesitant To Expand *Concepcion*'s "Purposes-And-Objectives" Preemption Test, Which Is Destabilizing Arbitration Law 27

D. The Court Should Re-Affirm The Role Of State Arbitration Law Because Of The Shrinking Scope Of Judicial Review Of Arbitration Agreements 31

III. The Court Should Affirm The Appellate Court's Interpretation Of The Contractual Terms Because Disregarding The Appellate Court's Interpretation Would Result In Erosion Of State Sovereignty 34

CONCLUSION 38

APPENDIX

List of Amici Curiae ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Abrahim v. ESIS, Inc., 2008 WL 220104 (N.D. Cal. Jan. 25, 2008) 27

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 36, 37

American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2011) 31, 32

Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000) 27, 28

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Byrd v. SunTrust Bank, 2013 WL 3816714 (W.D. Tenn. July 22, 2013) 32

Cable Connection, Inc. v. DirecTV, Inc., 190 P.3d 586 (Cal. 2008) 6

C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001) 7

Cohen v. DirecTV, Inc., 2007 WL 5314555 (Cal. Super. Ct. Nov. 15, 2007), *aff'd*, 101 Cal. Rptr. 3d 37 (Cal. Ct. App. 2009) 21

Collins v. Taco Bell Corp., 2013 WL 3984252 (C.D. Cal. July 31, 2013) 28

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 8

Figueroa v. THI of New Mexico, 306 P.3d 480 (N.M. Ct. App. 2012) 29, 30

TABLE OF AUTHORITIES – Continued

Page

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 5, 14

Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (N.Y. 1976) 7, 8, 13, 15

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Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) 4

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TABLE OF AUTHORITIES – Continued

Page

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THI of New Mexico v. Patton, 741 F.3d 1162 (10th Cir. 2014) 30

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Wyeth v. Levine, 555 U.S. 555 (2009) 30

Zaborowski v. MHN Gov't Servs., Inc., 2014 WL 7174222 (9th Cir. Dec. 17, 2014) 29

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 ..... *passim*

CAL. CIV. CODE § 1750 25

N.J. STAT. ANN. § 2A:23B-4(c) 18

TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose teaching, practice, and scholarship focus on arbitration, dispute resolution, and civil procedure. *Amici* are concerned that the expanding scope of the preemption doctrine under the Federal Arbitration Act (FAA) is destabilizing arbitration law and threatens to undermine party autonomy. *Amici* file this brief to provide context regarding the FAA's enactment and development, with a particular emphasis on the increasing scope of FAA preemption. In light of this background and based on a few core principles of arbitration law set forth below, *amici* respectfully urge the Court to affirm the decision below in favor of the respondents.

SUMMARY OF ARGUMENT

The cardinal rule of arbitration law is that arbitration is simply a matter of contract, and as a result, courts must generally enforce the bargained-for terms of an arbitration agreement as written, including terms that incorporate state law. In accordance with

[1] *Amici* file this brief in their individual capacities, not as representatives of the institutions with which they are affiliated. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation or submission of the brief, except for Loyola University New Orleans College of Law, which provided funds for the printing and filing of this brief. All parties have consented to the filing of this brief, and letters of consent have been filed with the Court. A list of *amici* appears in the appendix.

this cardinal rule, the FAA's preemption analysis does not occur in the abstract and must take into account the parties' agreement, which is the cornerstone of arbitration. Through their agreement to arbitrate, parties may incorporate state law, even if the FAA would normally preempt the state law. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt [a state law prohibiting arbitrators from hearing claims for punitive damages]."") (emphasis added). Enforcing the terms of an arbitration agreement as written advances the most critical value of arbitration law, party autonomy.

DirecTV made calculated choices when drafting a sophisticated arbitration clause that incorporated state law to govern different aspects of its agreement, and DirecTV should be held to its side of the bargain. The appellate court found the parties bargained for state law to govern the enforceability of the class waiver provision in the arbitration clause. As explained below, DirecTV probably incorporated a state-by-state analysis to frustrate the possibility of a nationwide class action, and the Court should enforce this bargain to incorporate "the law of [each customer's] state."

DirecTV's core argument, relying heavily on *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), is that the courts below should have enforced the class waiver as a matter of federal law pursuant to the preemption analysis from *Concepcion*, notwithstanding the clause providing that the "law of [each

customer's] state" governs the enforceability of the class waiver. However, *Concepcion* is inapposite and distinguishable. *Concepcion* did not involve a contract where parties specifically incorporated state law to govern the enforceability of the class waiver, and *Concepcion* addressed an unrelated, malleable state rule not at issue in this case.

Finally, disregarding the state court's interpretation of the contractual terms in this case would also raise serious federalism problems. To help promote federalism as well as party autonomy, the Court should affirm the decision below in favor of the respondents and enforce the parties' bargain to incorporate state law.

ARGUMENT

I. The Court Should Affirm The Decision Below Because The Parties Bargained For Application Of State Law, And The FAA's Primary Purpose Is The Enforcement Of Arbitration Agreements According To Their Terms, Including Terms Incorporating State Law

In several cases, the Court has acknowledged the supremacy and sweeping preemptive effect of the FAA. For example, in *Preston v. Ferrer*, 552 U.S. 346 (2008), the Court held the FAA can supersede a state law granting primary jurisdiction to an administrative agency to resolve certain disputes. Similarly, in

Southland Corp. v. Keating, 465 U.S. 1 (1984), the Court held the FAA can override a state statute requiring judicial resolution of franchising disputes. There is no doubt federal arbitration law is supreme when it applies. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (the FAA preempts state law guaranteeing a state judicial forum for personal injury claims against nursing homes).

Alongside several cases recognizing the FAA's broad preemptive reach, this Court has also declared, however, that the FAA does not "reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) (holding the FAA does not preempt the parties' choice of state law permitting a court to stay an arbitration proceeding). State law chosen by the parties co-exists with the FAA's preemption doctrine and can play a critical role in arbitration.

To help understand the relationship between state law and the FAA, it is important to recall two axiomatic arbitration law principles, and a straightforward application of these principles helps resolve this case in favor of the respondents. The first, most fundamental principle of arbitration law is that arbitration is a matter of contract between the parties. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual

rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement. ") (citations and internal quotations omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties.") (citations omitted).

The second principle, which flows from the first, is that parties can choose state law to govern their arbitration agreements, even if the FAA would normally override the state law. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008) (parties to an arbitration agreement "may contemplate enforcement under state statutory or common law"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt [a state law prohibiting arbitrators from hearing claims for punitive damages].") (emphasis added); *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) (the FAA does not preempt state law staying the enforcement of an arbitration clause "where, as here, the parties have agreed to arbitrate in accordance with California law").

About one month after holding in *Preston v. Ferrer*, 552 U.S. 346 (2008), that the FAA's broad preemptive power can displace a state's carefully-designed administrative scheme, the Court again acknowledged the critical role of state law in arbitration

in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The *Mattel* case addressed whether parties can draft arbitration agreements providing for enhanced judicial review of arbitral awards beyond the FAA's limited grounds for vacatur or modification. The Court held that §§ 10 and 11 of the FAA provide the exclusive grounds for vacating or modifying an award under the FAA. *Id.* at 584. The Court, however, emphasized that the FAA is not the only law governing arbitration. The Court explained that parties to an arbitration agreement, if they desire, "may contemplate enforcement under state statutory or common law. " *Id.* at 590. Therefore, if state statutory or common law provides for judicial vacatur of arbitral awards on grounds differing from the FAA, and if parties bargained for application of such state law, the FAA would not preempt application of state law under these circumstances. *See, e.g.*, *Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161 (Ala. 2010) (given *Mattel*, parties may agree under state common law for *de novo* judicial review of arbitral awards, which is not allowed under the FAA); *Cable Connection, Inc. v. DirecTV, Inc.*, 190 P.3d 586, 599 (Cal. 2008) ("[A] reading of the [California Arbitration Act] that permits the enforcement of agreements for merits review is fully consistent with the FAA 'policy guaranteeing the enforcement of private contractual arrangements.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95, 100-01 (N.Y. 1995) (because the FAA's "overriding policy" is "the enforcement of arbitration

agreements according to their terms," and because the parties explicitly chose state law to govern their arbitration clause, the FAA does not preempt vacatur of an award on state law grounds of irrationality and public policy, grounds not available under the FAA).[2] In sum, the FAA's core objective is the enforcement of arbitration agreements as written, and the FAA allows parties to bargain for application of state law as part of their arbitration agreement, even if the FAA, absent party choice, would normally preempt the state law. As explained below, the parties in this case bargained for "the law of [each customer's] state" to govern the enforceability of the class waiver, and courts should respect this choice. *Cf. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 (2001) ("By selecting Oklahoma law ('the law of the place where the Project is located') to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act.").

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), the Court also addressed the relationship between the FAA and state law. The state law at issue was New York's *Garrity* rule, which prohibited arbitral awards of punitive damages. *Id.* at

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[2] Taking advantage of state law, DirecTV drafted its arbitration clause to provide for *de novo* judicial review of mere "errors of law" in an arbitral award. *See* Customer Agreement § 9(c), Joint Appendix (JA) 128.

55 (citing *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976)). The Court emphasized that the "FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties," the foundation of all arbitration. 514 U.S. at 57. As succinctly stated by the Court in *Mastrobuono*, "*in the absence of contractual intent to the contrary*, the FAA would preempt the *Garrity* rule." *Id.* at 59 (emphasis added). Thus, if contractual intent exists showing that the parties bargained for state law to govern, as they did here, state law would control even if the FAA would normally override that state law.

In *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989), the Court addressed the FAA's preemption doctrine where the parties had bargained for state law to govern the arbitration agreement. In a similar posture to the case at hand, a California appellate court in *Volt* interpreted the parties' arbitration agreement to incorporate state law. *Volt*, 489 U.S. at 472. Under this state law, if pending litigation existed between a party to the arbitration agreement and a non-party, a court could stay arbitration so that the related litigation could resolve common questions, or the court could go even further and "refuse to enforce the arbitration agreement" and direct all the parties to litigate in one proceeding. *Id.* at 471 & n.3. However, under the FAA, courts must compel arbitration when there is a valid arbitration agreement, even if related litigation is pending. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (the FAA "leaves

no place for the exercise of discretion by a district court" and requires courts to enforce arbitration agreements, even if there is the possibility of inefficient, separate proceedings involving related claims). In reconciling this strong conflict between the FAA and state law, the Court in *Volt* held that the FAA would not preempt the state law because the terms of the parties' agreement, as interpreted by the state court, had incorporated that state law. *Volt*, 489 U.S. at 477-79. In holding that state law controlled, the Court emphasized the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479. *See also Mastrobuono*, 514 U.S. at 65 (Thomas, J., dissenting) ("We concluded [in *Volt*] that even if the FAA pre-empted the state statute as applied to other parties, the choice-of-law clause in the contract at issue demonstrated that the parties had agreed to be governed by the statute.").

A. The FAA's Preemption Doctrine Does Not Operate Without Consideration Of The Parties' Agreement, The Foundation Of All Arbitration

At first glance, it seems there is tension between the Court's cases like *Preston* and *Southland*, on the one hand, which set forth a sweeping, expansive preemption doctrine under the FAA, and cases like *Mattel*, *Mastrobuono*, and *Volt*, on the other, which acknowledge that state law can apply to arbitration agreements, even if the FAA would normally override the state law. However, any such apparent tension

vanishes when one recognizes that the FAA's preemption doctrine does not operate in the abstract and without consideration of the parties' agreement, which is the foundation for all arbitration. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties.") (citations and internal quotations omitted). If a contract or transaction involves interstate commerce, the FAA generally applies by default to an arbitration agreement involving such a contract or transaction. But as demonstrated by *Mattel*, *Mastrobuono*, and *Volt*, the FAA allows parties to incorporate state law to govern their agreement, even if the FAA would otherwise supersede or conflict with the state law in the absence of party choice.

Because FAA preemption cannot occur without reference to a particular agreement of the parties, the Court's FAA preemption cases cannot be divorced from the particular arbitration agreements in those cases. For example, in *Preston v. Ferrer*, 552 U.S. 346 (2008) – a highwater mark for FAA preemption where the Court held the FAA can displace a carefully-designed state administrative scheme, the Court cautioned its holding was limited to situations where the parties had a broad arbitration agreement. The Court emphasized that the "dispositive issue" is "*not* whether the FAA preempts [state law] wholesale" because in the abstract, the "FAA plainly has no such

destructive aim or effect." *Preston*, 552 U.S. at 353 (emphasis added). Instead, it was critical for the Court to examine the parties' agreement, the bedrock of arbitration, and the Court found that "when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 359. The contract at issue in *Preston*, with its broad terms, made a critical difference in the Court's analysis. In *Preston*, the parties had not agreed to an applicable state law as they have done in this case.

In light of the core principle that the parties' agreement is the foundation for all arbitration, consider the following hypotheticals involving *Preston*, as well as *Southland v. Keating*, 465 U.S. 1 (1984), and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Suppose that the contract between the artist and entertainment lawyer in *Preston* were rewritten to contain the following terms:

> Any claim arising out of this agreement shall be settled by arbitration. However, if the law of your state requires that such claims be heard in a judicial or administrative forum, this arbitration agreement is not enforceable.

It seems clear that if the artist's state required an administrative hearing for the dispute at issue in *Preston*, this hypothetical arbitration agreement would be unenforceable due to the bargained-for terms of the parties' agreement. In *Preston*, if the arbitration agreement had incorporated such a state

law requiring an administrative hearing, then the wholesale displacement of state law in *Preston* would not have occurred.

In *Southland*, the Court held that the FAA can preempt a state law requiring judicial resolution of franchising disputes when the parties had bargained for a broad arbitration clause requiring all disputes to be arbitrated. 465 U.S. at 16. However, suppose that the franchisor and franchisee in *Southland* had bargained for a different, narrower clause in their franchise agreement as follows:

> Any claim arising out of this agreement shall be settled by arbitration. However, if the law of your state prohibits the arbitration of such claims between a franchisee and franchisor, this arbitration agreement is not enforceable.

It seems apparent that if the law of a franchisee's state prohibited arbitration of claims between franchisees and franchisors, then the arbitration clause would be unenforceable in that state due to the bargained-for terms of the arbitration agreement – *even though the FAA would typically displace such a state law under the* Southland *ruling in connection with a broad clause*. However, in other states that did not ban the arbitration of franchise disputes, the hypothetical arbitration clause would be fully enforceable.

Similarly, suppose that the cellular telephone contract at issue in *Concepcion* were rewritten to contain the following terms:

> Any claim arising out of this agreement shall be settled by arbitration. There shall be no right to any class or representative proceedings in arbitration (the "class waiver"). However, if the law of your state invalidates this class waiver, this arbitration agreement is not enforceable.

Similar to the above hypotheticals, it seems clear that if the law of a customer's state invalidates judicial and arbitral class waivers, then the arbitration clause would be unenforceable for customers in that state because of the bargained-for terms of the contract, even though the FAA may displace such a state law under the *Concepcion* ruling. However, the hypothetical clause would be fully enforceable for customers in other states without such a law invalidating class waivers.

These hypotheticals illustrate that leading FAA preemption cases like *Preston*, *Southland*, and *Concepcion* would have been resolved differently if the parties had different arbitration clauses and specifically incorporated state law to govern, even if the FAA would, in the absence of party choice, override the particular state law. *Mastrobuono*, 514 U.S. at 59 ("*[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt the [state's] *Garrity* rule.") (emphasis added); *id.* at 65 (Thomas, J., dissenting) ("We concluded [in *Volt*] that even if the FAA preempted the state statute as applied to other parties, the choice-of-law clause in the contract at issue demonstrated that the parties had agreed to be

governed by the statute."). As the above hypotheticals demonstrate, the FAA's preemption doctrine cannot operate in a vacuum, without consideration of the parties' agreement. If parties incorporate state law to govern their arbitration clause, the FAA's prime directive is to enforce the agreement as written. *Volt*, 489 U.S. at 479.

If the FAA broadly trumped the parties' choice of state laws in the above hypotheticals, then the FAA would operate contrary to the most fundamental principle of arbitration law – "arbitration is simply a matter of contract." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citations omitted). In the above hypotheticals incorporating state law, it is important to recognize that the particular state law is not preventing arbitration or frustrating the purpose of the FAA. Instead, the parties' agreement, not state law, is limiting arbitration as the parties intended, and ensuring rigorous enforcement of the terms of an agreement is the FAA's core purpose. *Volt*, 489 U.S. at 479.

The Court's opinions in *Mattel*, *Mastrobuono*, and *Volt* set forth a straightforward rule based on the axiomatic principle that arbitration is a matter of contract: courts must enforce the terms of an arbitration agreement, including terms incorporating state laws. Turning to the case at hand, this case boils down to the core question of whether the parties bargained for application of state law to govern the enforceability of the class waiver when the contract provided for "the law of [each customer's] state" to

govern this waiver. Even if one assumes that the FAA may preempt the state laws at issue in the absence of contractual intent to the contrary,[3] the appellate court here found such contractual intent to incorporate state law. *Mastrobuono*, 514 U.S. at 59 (*"[I]n the absence of contractual intent to the contrary*, the FAA would pre-empt the [state's] *Garrity* rule.") (emphasis added). The appellate court in this case examined the parties' intent using contract law principles, and the court found the parties had explicitly bargained for adoption of state law to govern the class waiver's enforceability. Appendix to the Petition for Certiorari ("Pet. App.") at 2-16a. The appellate court reasoned that under state contract law, specific provisions govern over general provisions. Pet. App. 9-12a. Therefore, even though the contract states that the arbitration paragraph is generally subject to the FAA, the arbitration paragraph contains more specific language referring to the "law of your state" as governing the enforceability of the class waiver, and such specific language referencing state law trumps the more general reference to the FAA. *Id.* Furthermore, the appellate court reasoned that under state contract law, ambiguities are construed against the drafter, and this contract principle helped guide the court's interpretation of the phrase "law of your state" as referring to California law. *Id.*

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[3] As explained in Section II, *infra*, such preemption is not entirely clear. Many conflicts exist in lower courts regarding *Concepcion*'s preemption analysis and its impact on state laws.

This Court generally does not sit to review state courts' interpretations of contractual terms based on state contract law, and thus, the Court should affirm the decision below which applied general contract law principles and found that the phrase "law of [each customer's] state" refers to California law in this case. *Volt*, 489 U.S. at 474 ("Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.").

B. Enforcing The Parties' Agreement To Incorporate State Law Advances Party Autonomy, Promotes Federalism, And Improves Dispute Resolution In Both Arbitration And The Courts

Why would parties choose to incorporate state law that could potentially invalidate an arbitration clause? Most fundamentally, because arbitration is a matter of contract, parties are free to limit the circumstances under which they are bound to arbitrate. Courts show respect for party autonomy, the most critical value in arbitration law, by allowing parties to incorporate state law in arbitration agreements and enforcing the parties' limitations regarding when they will arbitrate. Edward Brunet, Richard E. Speidel, Jean E. Sternlight & Stephen H. Ware, *Arbitration Law in America: A Critical Assessment* 3 (2006) ("parties own the dispute and should be able to control the details of their disputing process"); *Volt*, 489 U.S. at 479 ("[T]he FAA's primary purpose [is] ensuring

that private agreements to arbitrate are enforced according to their terms."). This critical value of party autonomy is also "directly related to the freedom essential in a democratic state." Brunet, *supra*, at 5. By respecting the bargained-for language in the contract at hand, the Court would advance this fundamental value of party autonomy.

Giving effect to state laws chosen by the parties in an arbitration agreement promotes not only party autonomy, but also federalism values. Peter B. Rutledge, *Arbitration and the Constitution* 121 (2013). Rigorous enforcement of arbitration agreements as written, including the incorporation of state law chosen by the parties, can promote federalism values by spurring competition among states to regulate arbitration in different ways. *Id.* Respecting parties' affirmative choices of state law to govern their arbitration agreements can lead to greater diversity of state laws and greater variations between state laws and federal practice. *Id.* Vibrant, diverse bodies of state law governing arbitration should allow parties greater flexibility and choices to design procedures to resolve disputes, and greater experimentation in the field of arbitration can, in turn, spur innovation and developments in judicial procedures. For example, in June 2014, New York established new court procedures for complex commercial cases, and pursuant to these new rules, cases are supposed to be ready for trial within nine months of a request for judicial intervention. *See* Administrative Order of the Chief Administrative Judge of New York's Courts (June 2,

2014), https://www.nycourts.gov/rules/comments/orders/AO-77-14.pdf. Interestingly, the growth and use of commercial arbitration inspired these procedural innovations in court. Lia Iannetti, *New Rule on Accelerated Adjudication Procedures in New York State Courts*, http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/861/New-Rule-on-Accelerated-Adjudication-Procedures-in-New-York-State-Courts.aspx.

Although nothing forces parties to submit to state laws regarding arbitration, they may voluntarily choose to do so for many reasons. The above hypothetical based on *Preston v. Ferrer*, *supra* p. 11, illustrates one reason why parties may voluntarily choose to submit to state law. If a state establishes a specialized administrative agency to resolve particular claims, the drafting party may prefer the benefits, expertise, and carefully-developed rules of such administrative agencies to arbitration, and thus, the drafting party may provide that if "the law of your state" requires resolution of a dispute before an administrative agency, the arbitration clause is not enforceable. But in other states where such specialized administrative agencies do not exist, the drafting party may prefer arbitration.

Another reason parties may bargain for application of state law is that state law may have special features unavailable through the FAA, and the ability to incorporate such features may make arbitration more appealing. *See, e.g.*, N.J. Stat. Ann. § 2A:23B-4(c) ("[N]othing in this act shall preclude the parties from expanding the scope of judicial review of an

award by expressly providing for such expansion. ."); *Mattel*, 552 U.S. at 590 (although the FAA does not provide for expanded judicial review of awards, parties can agree to incorporate "state statutory or common law" permitting a different level of judicial review). For example, taking advantage of state law, DirecTV made a purposeful choice in drafting its arbitration clause to provide that arbitral awards can be challenged for mere "errors of law," a level of judicial review not available under the FAA. *See* Customer Agreement § 9(c), JA 128.

Parties may also choose state law to govern arbitration clauses due to reputational concerns. For example, if a state has a strong policy guaranteeing a judicial or administrative forum for consumer or employment claims, a company or employer may be willing to forgo arbitration in that state in certain circumstances to promote a good reputation with employees or consumers in that state and to avoid the perception of undermining state policies. In addition to maintaining a good reputation with customers or employees, employers or corporations may willingly choose to submit to state policies to maintain a good rapport with state government officials or regulators, who may have the power to grant benefits in other matters. Perhaps DirecTV drafted a contract providing for application of "the law of [each customer's] state" in order to maintain a good reputation among customers and government regulators. Concern about one's reputation among members of the public and government officials due to the use of arbitration

clauses is not far-fetched. For example, in 2014, General Mills suddenly reversed its adoption of an arbitration clause just a few days after its implementation because of criticism from the public and government officials. *Sen. Menendez Urges FTC to Intervene on Behalf of General Mills Customers*, Apr. 17, 2014, http://www.menendez.senate.gov/news-and-events/press/sen-menendez-urges-ftc-to-intervene-on-behalf-of-general-mills-customers; Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. Times, Apr. 20, 2014, at A1.

One can infer that another particular reason petitioner DirecTV drafted a contract providing for state law to govern is that a state-by-state analysis can be used to frustrate the certification of a nationwide class. DirecTV included a "blowup" or non-severability clause, which invalidates the entire arbitration agreement if "the law of [each customer's] state" finds the class waiver unenforceable. Customer Agreement § 9(c), JA 128. Imagine a hypothetical situation where DirecTV's agreement did not contain the blowup clause. Without a blowup clause and its direction to engage in a state-by-state analysis of the class waiver, there is a risk that a court in one state may apply its state law to invalidate the class waivers for an entire nationwide class. After such a sweeping invalidation of the class waivers for an entire nationwide class based on the laws of one state, perhaps class proceedings could potentially occur consisting of a nationwide class of all DirecTV customers. However, by including the blowup clause

requiring an individualized, state-by-state analysis, DirecTV ensures that if a customer files a nationwide class action in court, a court would not sweepingly invalidate the class waiver for the entire nationwide class based on the laws of just one state. As a result of the blowup clause with its state-by-state analysis, arbitration will generally be compelled on an individual basis in states whose laws permit class waivers. But in the event a court finds that a class waiver is not allowed under a particular state's laws, the blowup clause providing for a state-by-state analysis would invalidate the arbitration clause just in that one state, not the entire country, and the case could perhaps proceed as a statewide class, but not automatically as a nationwide class. By incorporating the "law of [each customer's] state" in the blowup clause, DirecTV made a calculated choice to provide for a state-by-state analysis of its class waiver, which in turn helps thwart the possibility of certification of a nationwide class. *See, e.g.*, *Hill v. T-Mobile USA, Inc.*, 2011 WL 10958888, at *18 (N.D. Ala. May 16, 2011) ("Plaintiffs have also failed to factor in the varying impact that class action waivers, agreements to arbitrate, and challenges to such provisions' contractual enforceability *as a matter of state law* will have on the predominance inquiry [in connection with a purported nationwide class].") (emphasis added); *Cohen v. DirecTV, Inc.*, 2007 WL 5314555 (Cal. Super. Ct. Nov. 15, 2007) ("Where a *state by state* analysis of an arbitration provision's enforceability would be required to certify a nationwide class, predominance does not exist and the nationwide class should not be

certified.") (emphasis added and citation omitted), *aff'd*, 101 Cal. Rptr. 3d 37 (Cal. Ct. App. 2009).

DirecTV's arbitration clause is a sophisticated, tailored arbitration clause reflecting DirecTV's calculated decisions to design a specific arbitration proceeding of its own liking, which parties are entitled to do under the FAA. Taking advantage of state law, DirecTV's custom-fit arbitration clause provides that arbitral awards can be challenged for mere "errors of law," a level of judicial review not available under the FAA. Customer Agreement § 9(c), JA 128; *Mattel*, 552 U.S. at 590 (although the FAA does not allow for contractually-expanded judicial review of awards, parties can modify the level of judicial review pursuant to "state statutory or common law"). Also, most likely to hinder the certification of a nationwide class and ensure individual arbitration proceedings or at most, statewide classes, DirecTV specifically provided for a state-by-state analysis regarding the enforceability of its class waiver. Customer Agreement § 9(c), JA 128-29. Having drafted such a detailed, sophisticated arbitration clause incorporating state laws for its own benefit, DirecTV should be held to its side of the bargain, and the clause should be enforced according to its terms.

II. The Court Should Not Apply *Concepcion*'s Preemption Test In This Case

DirecTV relies heavily on *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), to argue that the

class waiver must be enforced as a matter of federal law under *Concepcion*'s preemption analysis, notwithstanding the provision that the "law of [each customer's] state" governs the enforceability of the class waiver in this case. However, *Concepcion* is distinguishable and does not control this case because *Concepcion* did not involve a contract where parties explicitly chose to incorporate state law and because *Concepcion* involved an unrelated conflict between the FAA and a vague state rule not at issue here. Furthermore, *Concepcion*'s "purposes-and-objectives" preemption test is destabilizing arbitration law, and because of many problems associated with this test, the Court should be hesitant to expand *Concepcion* to the case at hand where the parties bargained for application of state law in a custom-fit arbitration clause.

A. *Concepcion* Is Inapplicable Because The Parties In *Concepcion* Did Not Bargain For State Law To Govern The Enforceability Of The Class Waiver

In *Concepcion*, the Court faced a narrow, specific issue: in connection with a broad arbitration clause, whether § 2 of the FAA preempted California's *Discover Bank* rule, which classified class waivers as unconscionable under certain circumstances. 131 S. Ct. at 1746 ("The question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable."). As explained above, the FAA's preemption doctrine does not operate in a vacuum without

consideration of the parties' agreement, the foundation of all arbitration. In other words, a correct preemption analysis under the FAA must take into account the parties' agreement; the FAA's preemption analysis cannot be limited to solely examining the FAA and a particular state law in the abstract without consideration of the agreement. It is critical to remember that the arbitration clause in *Concepcion* was broad, and the Court in *Concepcion* did not address a situation where the parties explicitly adopted state law to govern the arbitration agreement, or more specifically, the enforceability of the class waiver. Instead, the plaintiffs in *Concepcion* tried to argue that a state rule superseded and invalidated the terms of their contract. *Id.* at 1745-46. Here, however, the parties specifically incorporated state law into their contract. If the parties in *Concepcion* specifically chose state law to govern the enforceability of the class waiver, the outcome in *Concepcion* could have been different because, as explained above, the FAA allows parties to incorporate state law to govern their arbitration agreements.

B. *Concepcion* Is Inapplicable Because *Concepcion* Addressed An Unrelated, Manipulable State Rule Not At Issue Here

Concepcion is also distinguishable because *Concepcion* involved California's *Discover Bank* rule, which only applies if certain factors exist, including "small amounts of damages," a "consumer contract of adhesion," a party with "superior bargaining power,"

and "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." 131 S. Ct. at 1746. The Court in *Concepcion* was skeptical of the *Discover Bank* rule because it found this particular state rule was "malleable" and "toothless." *Id.* at 1750. For example, the requirement of "small" damages was found to be unclear because several thousand dollars could be considered "small," and virtually every consumer transaction involves adhesive contracts with a stronger party. *Id.* Moreover, to trigger the *Discover Bank* rule, a party needed just a mere allegation of a scheme to defraud. *Id.* In other words, the Court found the *Discover Bank* rule was a hollow rule that could be manipulated to invalidate arbitration agreements.

In the present case, however, the vague *Discover Bank* rule from *Concepcion* is not at issue. Instead, the plaintiffs' underlying claims, which also serve as a basis for invalidating the class waiver provision, include California's Consumers Legal Remedies Act, CAL. CIV. CODE § 1750, *et seq.*, a consumer protection statute embodying strong, fundamental state policies and banning all contractual waivers of the right to bring collective proceedings on behalf of other consumers. JA 56-97. The trial court in the present case found that this California law, which the parties bargained for, provided a clear basis to invalidate the class waiver provision in DirecTV's contract. Pet. App. 17-20a. After finding the waiver of class procedures to be invalid under the bargained-for state law, the court then enforced the parties' bargain to invalidate

the entire arbitration clause pursuant to the blowup or non-severability clause in the contract. *Id.* The statute at issue in the present case, which helps protect public rights by banning all contractual waivers of collective proceedings, is different from the "malleable" and "toothless" state rule considered in *Concepcion*.

It is not clear whether the FAA as interpreted in *Concepcion* would preempt every possible law that could invalidate waivers of judicial class procedures or arbitral class procedures, such as, for example, state or federal laws providing for *qui tam* actions, laws providing for public injunctive and collective relief to protect consumers or employees, or the right of workers to engage in concerted activity. *See, e.g.*, *In re D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (class waivers violate federal labor law). *Concepcion* did not involve the state law at issue in this case and instead involved a manipulable state rule, which the *Concepcion* plaintiffs tried to use to override the terms of their agreement.

However, and more importantly, the Court does not need to determine the precise contours of the FAA's preemption doctrine under *Concepcion* because, unlike the arbitration clause in *Concepcion*, DirecTV and the respondents specifically chose state law to govern the enforceability of the class waiver in this case.

C. The Court Should Be Hesitant To Expand *Concepcion*'s "Purposes-And-Objectives" Preemption Test, Which Is Destabilizing Arbitration Law

Concepcion's preemption test examines whether a state law presents an "obstacle" to the FAA's objectives, or whether a state law has a "disproportionate impact" on arbitration or somehow interferes with a vague notion of the "fundamental attributes of arbitration," which are not explicitly defined in the statute. 131 S. Ct. at 1747, 1748. This vague "purposes-and-objectives" preemption test is destabilizing arbitration law and causing confusion and conflicting lower court decisions.

Prior to *Concepcion*, many courts engaged in a review of arbitration agreements by borrowing an analysis derived from this Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). For example, based on *Gilmer*, lower courts would sometimes find that an arbitration agreement was unconscionable and unenforceable if the plaintiff had to pay prohibitively expensive arbitrator's fees. *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000) (relying on *Gilmer* to develop standards regarding arbitrator's fees); *Abrahim v. ESIS, Inc.*, 2008 WL 220104, at *5-6 (N.D. Cal. Jan. 25, 2008) (relying on the *Armendariz* unconscionability analysis to invalidate an arbitration agreement's fee provisions); *Lelouis v. W. Directory Co.*, 230 F. Supp. 2d 1214 (D. Or. 2001) (same). However, based on the vague, broad preemption

analysis of *Concepcion*, some courts have rejected or questioned this pre-*Concepcion* unconscionability analysis regarding arbitration fees. *Compare Mercado v. Doctors Med. Ctr. of Modesto, Inc.*, 2013 WL 3892990, at *6 (Cal. Ct. App. July 26, 2013) (*Concepcion*'s preemption test casts doubt on the continuing validity of the *Armendariz* unconscionability analysis because unconscionability arguments can no longer rely on the uniqueness of an arbitration clause), *with Collins v. Taco Bell Corp.*, 2013 WL 3984252, at *4 (C.D. Cal. July 31, 2013) (*Concepcion* does not abrogate the unconscionability analysis set forth in *Armendariz*).

Some courts are interpreting *Concepcion* as severely restricting the scope of unconscionability analysis. For example, in *Lucas v. Hertz Corp.*, a federal district court addressed an unconscionability challenge to an arbitration agreement that arguably banned all discovery. 875 F. Supp. 2d 991 (N.D. Cal. 2012). The court explained that prior to *Concepcion*, many courts invalidated severe discovery limits as unconscionable: "Prior to the Supreme Court's ruling in *Concepcion*, numerous courts, at both the state and federal level, found arbitration agreements substantively unconscionable where the rules of the arbitral forum allowed for only minimal discovery or where the affect [sic] of the discovery rules operated solely to one side's benefit." *Id.* at 1007 (citations omitted). However, the *Lucas* court noted that under *Concepcion*, the FAA preempts an unconscionability analysis relying on the "uniqueness of an agreement to arbitrate,"

and therefore, "limitations on arbitral discovery no longer support a finding of substantive unconscionability." *Id.* at 1007. The *Lucas* court found that "in this post-*Concepcion* landscape, the arbitration agreement [at issue with its limited discovery provisions] is not substantively unconscionable." *Id.* at 1009. *See also Zaborowski v. MHN Gov't Servs., Inc.*, 2014 WL 7174222, at *3 (9th Cir. Dec. 17, 2014) (dissenting opinion) (the majority's test regarding severance, which finds that multiple unconscionable provisions will render an entire arbitration agreement unconscionable and unenforceable, has "a disproportionate impact on arbitration agreements," and therefore under *Concepcion*, the FAA should preempt the majority's test).

Concepcion's broad preemption test is also causing problems with lower courts' analysis of lack of mutuality in arbitration agreements. If only one party is bound to arbitrate, or if an arbitration clause excludes from its scope certain claims likely to be brought by one party, some courts have held that such a lack of mutuality makes the arbitration clause unconscionable. For example, in *Figueroa v. THI of New Mexico*, 306 P.3d 480 (N.M. Ct. App. 2012), a personal injury nursing home case, a New Mexico appellate court found such a one-sided arbitration clause to be unconscionable and unenforceable. The court explained that an arbitration agreement is one-sided or unconscionable "where the drafter unreasonably reserved the vast majority of his claims for the courts, while subjecting the weaker party to arbitration

on essentially all of the claims that party is likely to bring." *Id.* at 491. However, in another case involving the identical arbitration clause in *Figueroa*, the Tenth Circuit, relying on *Concepcion*, found that the clause was fully enforceable because the FAA preempted such an unconscionability analysis. *THI of New Mexico v. Patton*, 741 F.3d 1162 (10th Cir. 2014). The Tenth Circuit reasoned that the lack of mutuality analysis, whereby an arbitration clause is unconscionable because one party reserves the right to go to court, incorrectly presumes the inferiority of arbitration. *Id.* at 1169-70. The Tenth Circuit held that under *Concepcion*, the FAA preempts such a state law focusing on the uniqueness of an arbitration clause. *Id.*

Concepcion's vague "purposes-and-objectives" preemption test is creating confusion and conflicting decisions in a variety of fact patterns involving arbitration fees, discovery limits, severance of unconscionable terms, and lack of mutuality. Such confusion in arbitration law is particularly harmful because increased litigation regarding arbitration law undermines the value of arbitration. Because *Concepcion* is destabilizing arbitration law with its vague preemption doctrine in many different contexts, the Court should not expand *Concepcion* to apply here. Instead, *Concepcion* should be limited to its unique facts regarding the validity of a class waiver in the face of a malleable state rule and broad arbitration clause, where parties did not specifically incorporate state law to govern. *Cf. Wyeth v. Levine*, 555 U.S. 555,

594, 604 (2009) (Thomas, J., concurring) ("purposes-and-objectives" preemption analysis is "freewheeling" and "inherently flawed," gives effect to "judicially manufactured policies," and ultimately results in an "illegitimate" and "unconstitutional invalidation of state laws").

D. The Court Should Re-Affirm The Role Of State Arbitration Law Because Of The Shrinking Scope Of Judicial Review Of Arbitration Agreements

There is a more troubling aspect arising from *Concepcion* when one considers the broader context of the Court's arbitration jurisprudence. Some courts are using *Concepcion*'s broad preemption test to narrow the scope of judicial review regarding the enforceability of arbitration agreements. As explained in the prior section, *Concepcion*'s vague preemption doctrine is circumscribing the unconscionability analysis of courts, which in turn makes it more difficult for courts to police the fairness of arbitration clauses. As demonstrated by the *Lucas* case discussed in the prior section, some courts broadly construe *Concepcion* as preempting any argument related to the uniqueness of an arbitration clause, and hence some courts are rejecting unconscionability attacks regarding one-sided, unfair arbitration procedures. Furthermore, in *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2011), the Court limited the applicability of the effective vindication doctrine and characterized the doctrine as dicta. For decades,

the effective vindication doctrine provided a tool for courts to review the fairness of particular arbitration agreements to ensure that parties could effectively vindicate their rights. However, courts are construing the *American Express* case as limiting the ability of parties to challenge unfair arbitral terms. *Byrd v. SunTrust Bank*, 2013 WL 3816714, at *18 (W.D. Tenn. July 22, 2013) ("[The Court's *American Express* decision] makes it more difficult to demonstrate that particular provisions in an arbitration clause are unenforceable because those provisions make it more expensive to arbitrate a federal statutory claim."); *compare Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (finding "provisions of arbitration agreements invalid because they prevent the vindication of statutory rights under *state* and federal law") (emphasis added), *with Torres v. CleanNet, U.S.A., Inc.*, 2015 WL 500163, at *6-7 (E.D. Pa. Feb. 5, 2015) (*American Express* limited the effective vindication doctrine as dicta, and this dicta does not apply to protect the vindication of state statutory rights). Additionally, in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), the Court addressed delegation clauses whereby parties delegate to the arbitrator issues regarding the enforceability of arbitration agreements. The Court found that such delegation clauses are fully enforceable unless a party makes the difficult showing of directing a narrow, specific challenge to the delegation clause. *Id.* at 72.

Taken together, *Concepcion*'s expansive preemption test, *American Express*' limiting of the effective

vindication doctrine as dicta, and *Rent-A-Center*'s enforcement of delegation clauses are all combining to constrict the scope of judicial review of the enforceability of individual arbitration agreements. The significance of these cases is that there is less judicial oversight of arbitration agreements for fundamental fairness.

Furthermore, as demonstrated by the Consumer Financial Protection Bureau's landmark report to Congress regarding arbitration, meaningful consent from consumers is often lacking in connection with arbitration agreements. Consumer Fin. Prot. Bureau, *Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at 11 (March 2015) ("Consumers are generally unaware of whether their credit card contracts include arbitration clauses."). However, the foundation of all arbitration is supposed to be based on the meaningful consent of the parties. *Cf. Wellness Int'l Network v. Sharif*, 575 U.S. ___ (2015) (waiver of the right to Article III adjudication should be "knowing and voluntary").

In light of the narrowing scope of judicial review of arbitration agreements under the FAA, it seems that courts are moving closer to a model of almost rubberstamping arbitration agreements, without much analysis of the fairness of particular arbitration provisions. Courts are increasingly sending consumers and employees, without meaningful consent, into a quasi-judicial system lacking many procedural protections. Because of the decreasing level of judicial

review of arbitration agreements under the FAA, state law can play an increasingly important role in reviewing the enforceability and fairness of arbitration agreements. Considering this broader context of the development of FAA jurisprudence and the explosion of arbitration clauses in America, the Court should re-affirm the role of state law in connection with arbitration agreements when selected by the parties and avoid further expansion of *Concepcion* preemption in this case.

III. The Court Should Affirm The Appellate Court's Interpretation Of The Contractual Terms Because Disregarding The Appellate Court's Interpretation Would Result In Erosion Of State Sovereignty

To better understand the preemption issues and federalism concerns in this case, it is helpful to recall the context in which Congress enacted the FAA in 1925. This background provides additional reasons why the Court should not disturb the state court's interpretation of the phrase "the law [of a customer's] state" to refer to California law in this case.

It is important to remember that arbitration laws existed in America long before the enactment of the FAA and similar state statutes during the 1920s. The FAA and similar state statutes enacted during the 1920s are "modern" arbitration statutes, in the sense that these statutes generally provide for the enforcement of an agreement to arbitrate *future* disputes

arising out of the agreement. Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 15 (1992). However, arbitration law in America did not begin with these modern arbitration statutes. Prior to the enactment of modern arbitration laws during the 1920s, nineteenth-century America was teeming with a rich, complex body of arbitration laws, both statutory and judge-made. *Id.* at 15; Wesley A. Sturges, *A Treatise on Commercial Arbitration and Awards* 2 (1930) (nearly every state permitted "at least two general systems of arbitration," arbitration pursuant to common law and arbitration pursuant to state statutes); James S. Caldwell, *A Treatise of the Law of Arbitration* (1853). There was, and still is, a rich tapestry of state arbitration laws that should co-exist with the FAA in our federalist system. In cases like *Mattel*, *Mastrobuono*, and *Volt*, this Court has recognized that through the parties' agreement, parties may tap into and incorporate these state laws.

Merchants during the early 1900s developed and lobbied for the FAA because they desired a binding way to resolve future commercial disputes outside of court, particularly in light of a changing and growing national economy in a pre-*International Shoe* era. Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* 98-99, 176-77 (2013). The quintessential type of dispute covered by the FAA involved contractual, not statutory, claims

regarding the quality of goods shipped from one state to another.[4] Also, the enactment of the FAA was part of a broader movement for procedural reform. Szalai, *supra*, at 166-73; *see also* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. Rev. 1939 (2014). Business interests turned to arbitration because of frustrations with the delays and technicalities of an overly-complex, overburdened judicial system of the early 1900s. Szalai, *supra*, at 166-73. Both the FAA and the Rules Enabling Act of 1934, which, of course, led to the establishment of a nationally-uniform set of procedural rules for the federal courts, were landmark procedural reforms which grew out of this same environment of frustration with the complex, existing judicial system. *Id.*

The governing, universal understanding of arbitration law at the time of the FAA's enactment was that arbitration law was procedural law and the law of the forum. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 287 & n.1 (1995) (Thomas, J.,

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[4] *See* 9 U.S.C. § 2 ("A written provision in . . a contract evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such contract*. . . ") (emphasis added); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting, joined by Brennan, J.) ("The plain language of this statute . . . does not encompass a claim arising under federal law. . . . Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims."). The FAA was drafted to cover only claims arising out of a contract, not statutory claims, such as some of the claims in this case. JA 56-97.

dissenting, joined by Scalia, J.). As thoroughly demonstrated by the late-Professor Ian Macneil in his groundbreaking book regarding the FAA, Congress passed the FAA in 1925 as a procedural statute applicable solely in the federal courts. *See generally* Macneil, *supra*. However, in 1984, decades after the FAA's enactment, this Court held that the FAA governed state proceedings in *Southland v. Keating*, 465 U.S. 1 (1984). As a result of the *Southland* decision, many believe that *Southland* has created an ongoing, "permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes," and "*Southland* will not become more correct over time." *Allied-Bruce Terminix*, 513 U.S. at 285 (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [*Southland*]."); *Southland*, 465 U.S. at 23 (O'Connor, J., dissenting, joined by Rehnquist, J.) ("Congress intended to require federal, not state, courts to respect arbitration agreements."). In light of these constitutional concerns regarding *Southland*'s interference with state sovereignty, the Court should respect the state court's interpretations of the terms of the arbitration agreement at hand and not prevent parties from choosing state law.[5]

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[5] Petitioner DirecTV quotes from section 4 of the FAA to stress that arbitration must be compelled "in accordance with the terms of the agreement." Pet. Br. 4, 11 (quoting 9 U.S.C. § 4). However, when quoting section 4 of the FAA in its brief, DirecTV does so very selectively. DirecTV conveniently omits the language from section 4 of the FAA making it clear that section 4

(Continued on following page)

Furthermore, even if one accepts *Southland* as correctly decided and that the FAA applies in state courts, the Court should still rule in favor of the respondents. As explained above, this Court generally does not sit to review state courts' interpretations of contractual terms based on state contract law. *Volt*, 489 U.S. at 474 ("Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."). Moreover, as recognized in cases like *Mattel*, *Mastrobuono*, and *Volt*, courts must enforce the terms of an arbitration agreement, including terms that incorporate state law, even if the FAA would normally override the state law. State arbitration law should be allowed to flourish and co-exist with the FAA when the parties agreed to incorporate such state law.

CONCLUSION

To promote party autonomy, to carry out the FAA's core purpose, and to respect federalism values, *amici* respectfully ask the Court to enforce the

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was designed for petitions to be filed only in "United States district court." *Compare* 9 U.S.C. § 4 (a party "may petition any United States district court" for an order compelling arbitration) *with* Pet. Br. 4 (a party "may petition any . . court . . . " for an order compelling arbitration) (ellipsis in petitioner's brief). The FAA, which is a fully integrated, unitary statute covering the different stages of arbitration, was intended to apply only in federal court. *See generally* Macneil, *supra*.

bargained-for terms of the parties providing for "the law of [each customer's] state" to govern. The Court should affirm the appellate court's decision and interpretation of the contract in favor of the respondents.

Respectfully submitted,

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NO. 14-462

In the Supreme Court of the United States

DIRECTV, INC.,
Petitioner,
–v–
AMY IMBURGIA, ET AL.,
Respondents.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Federalism Is A Well-established Principle That Leaves Substantial Powers To The States Unless Congress Provides A Clear And Manifest Purpose To The Contrary. 3

II. The Federal Arbitration Act Is A Law In Which Congress Intended To Respect State Law And The Principles Of Federalism. 6

III. In The Interests Of Federalism, And To Honor Congress' Intent, This Court Should Respect The Parties' Rights To Contract, Including Their Agreement That State Law Governs Their Disputes. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Allied–Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 7, 10
Am. Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) 2, 11
AT&T Mobility v. Concepcion,
131 S. Ct. 1740 (2011) 7
Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 3, 4
Bernhardt v. Polygraphic Co.,
350 U.S. 198 (1956) 8
Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,
489 U.S. 141 (1989) 6
Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006) 7
Dean Witter Reynolds Inc. v. Byrd,
470 U.S. 213 (1985) 6, 8
Doctor's Associates, Inc. v. Casarotto,
517 U.S. 681 (1996) 8
Egelhoff v. Egelhoff,
532 US 141 (2001) 4
First Options of Chicago, Inc. v. Kaplan,
514 U.S. 938 (1995) 10
Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985) 4
Green Tree Financial Corp. v. Bazzle,
539 U.S. 444 (2003) 8, 10
Gregory v. Ashcroft,
501 U.S. 452 (1991) 4, 5
Hawsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 2, 10, 11
Marbury v. Madison,
5 U.S. 137 (1803) 4

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 7
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 8, 9
Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,
460 U. S. 1 (1983) 9
New York v. United States,
505 U.S. 144 (1992) 4
Preston v. Ferrer,
552 U.S. 346 (2008) 7
Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 8, 9
Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947) 1, 2, 5, 6
Silkwood v. Kerr-McGee Corp.,
464 U.S. 238 (1984) 6
Southland Corp. v. Keating,
465 U.S. 1 (1984) 8
United States v. Moorman,
338 U.S. 457 (1950) 2, 3, 11
Volt Info. Scis. v. Bd. of Trs.,
489 U.S. 468 (1989) 2, 7, 8, 9, 10
Will v. Michigan Dept. of State Police,
491 U.S. 58 (1989) 5
Wyeth v. Levine,
555 U.S. 555 (2009) 2, 5

Statutes and Legislative Materials

Federal Arbitration Act,
9 U.S.C. § 1, *et seq.* ..... *passim*
9 U.S.C. § 2 ..... 2, 6, 7
28 U.S.C. § 1331 9
United States Constitution,
Tenth Amendment 1, 3

Rules

Rules of the Supreme Court of the United States,
Rule 37.3 1
Rule 37.6 1

Other Authorities

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Young, Earnest, *The Ordinary Diet of the Law: The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253 6

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are law professors whose teaching and scholarship involve the fields of constitutional law, contracts, administrative law, civil procedure, federalism, and dispute resolution/arbitration. *Amici* believe that this case presents this Court with an opportunity to affirm principles of federalism and to acknowledge that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is an example of a law in which Congress intended to respect federalism and to retain the power of the States with respect to privately negotiated agreements to arbitrate.

SUMMARY OF ARGUMENT

A core principle of federalism is well established: "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and no person other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

Further, the institutional affiliations of *amici* are included for identification purposes only, and are not meant to imply that the positions set forth herein are taken on behalf of the institution.

Elevator Corp., 331 U.S. 218, 230 (1947) (internal citations omitted). This presumption is a "cornerstone" of this Court's pre-emption jurisprudence. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The present matter concerns the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* (hereinafter "FAA"). The FAA "does [not] reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989). Rather, the FAA provides that an arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Indeed, this Court has recognized that Congress did not preempt the field of arbitration in enacting the FAA. *Volt*, 589 U.S. at 478. It is thus clear that Congress intended the FAA to respect federalism and maintain the power of the States with respect to privately negotiated agreements to arbitrate.

This Court has repeatedly confirmed that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Hawsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (citations and internal quotations omitted). When parties voluntarily enter into a contract whereby they agree to follow state law, the state law is not preempted. *See, Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995). "[S]uch an agreement of parties [should not] be frustrated by judicial 'interpretation' of contracts." *United States v. Moorman*, 338 U.S. 457, 462 (1950). "If parties competent to decide for themselves are to be deprived

of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." *Id.*

In this case, the Parties' contract specifies that State law shall be applied to determine whether a contract was formed, and provides that State law governs the enforceability of the class action waiver and anti-severability clause in the provision regarding arbitration. This Court should respect the core principle of federalism and the specific intent of the Parties in this matter to leave to the State of California the power to decide and resolve matters relating to the enforceability of the arbitration agreement they made pursuant to that State's laws. As such, it is the position of *Amicus Curiae*, that this Court should hold that reference to State law in the arbitration agreement at issue permits the State Court to review that agreement in accordance with the referenced State law.

ARGUMENT

I. Federalism Is A Well-established Principle That Leaves Substantial Powers To The States Unless Congress Provides A Clear And Manifest Purpose To The Contrary.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234,

242 (1985), *quoting Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137 (1803). This Court has recognized "the practical importance of preserving local independence, at retail, i.e., by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy." *Egelhoff v. Egelhoff*, 532 US 141, 160 (2001) (Breyer, J. dissenting).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks omitted). As James Madison stated:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991), citing *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed.

1961). Indeed, this Court has acknowledged "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.*, 501 U.S. at 424.

"National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, as the special rather than the ordinary case." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 544 (1954). "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230 (internal citations omitted). The analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.*

This presumption is a "cornerstone" of this Court's pre-emption jurisprudence. *Wyeth v. Levine*, 555 US 555 at 565. Thus, "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory*, 501 U.S. at 424, citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal citations omitted); Rotunda & Nowak, *Treatise on Constitutional Law: Substances & Procedure*, 2 Treatise on Const. L. § 12.4(c)(iv)(1) (5th ed., 2013) ("The Supreme Court presumes that Congress does not intend to preempt state legislation unless there is a clear indication from the language or purposes of the federal action or regulation."). As one

scholar articulated, "[b]y requiring Congress to speak clearly in order to preempt state law, *Rice* ensures notice to legislative advocates of state interest that preemption is contemplated in proposed legislation, and it imposes an additional procedural hurdle to legislation that undermines state prerogatives." Earnest Young, *The Ordinary Diet of the Law: The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 265.

Finally, "[t]he case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989), *quoting Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). Far from creating a federal rule that might conflict with State law in this case, the FAA entrusts States with determining the law in this area, as discussed below.

II. The Federal Arbitration Act Is A Law In Which Congress Intended To Respect State Law And The Principles Of Federalism.

The matter before this Court concerns the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* (hereinafter "FAA"). This Court has recognized the purpose of the FAA is "ensur[ing] judicial enforcement" of arbitration agreements. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985). As is relevant here, the FAA provides that an arbitration provision "shall be valid, irrevocable, and enforceable,

save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This language evidences Congress' clear intent to retain the States' power under the FAA:

> [b]y using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation's laws. We have often expressed this idea in opinions that set forth presumptions. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action").

AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1762 (2011) (Breyer, J., dissenting), *id.* at 1753 (Thomas, J., concurring) ("the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress").[2]

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[2] Justice Thomas has stated repeatedly his belief the FAA "does not apply to proceedings in state courts" at all. *See, Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); *Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–297 (1995) (same); *Buckeye Check Cashing, Inc. v.*

Importantly, the FAA "does [not] reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477, citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA). Indeed, this Court has recognized that Congress has not preempted the field of arbitration in enacting the FAA:

> While Congress was no doubt aware that the [Federal Arbitration] Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." *Byrd*, 470 U.S., at 220. Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, *see id.*, at 219 (the Act "does not mandate the arbitration of all claims"), nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S., at 628 (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)). It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in

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Cardegna, 546 U.S. 440, 449 (2006) (same); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (same); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (same). *But see, Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984).

> accordance with their terms. *See Prima Paint, supra*, at 404, n. 12 (the Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so").

Volt, 489 U.S. at 478. Thus, arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, *see Mitsubishi, supra*, at 628, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.").

Congress' manifest intent is further demonstrated by the fact that, while the FAA creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1, 25, n. 32 (1983). These statements of Congressional intent to retain the power of the States taken with the absence of any manifest statements of intent to obviate such power, make clear that Congress intended the FAA to respect state law and the principles of federalism. As such, this Court should not substitute its judgment for that of Congress.

III. In The Interests Of Federalism, And To Honor Congress' Intent, This Court Should Respect The Parties' Rights To Contract, Including Their Agreement That State Law Governs Their Disputes.

This Court repeatedly has stressed that arbitration clauses are governed by state, not federal, contract law except in those instances where state law targets arbitration clauses for treatment that is inferior to other types of contracts. *E.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (in cases involving the FAA, courts "should apply ordinary state-law principles that govern the formation of contracts"); *Volt*, 489 U.S. at 474 ("the interpretation of private contracts is ordinarily a question of state law"). In addition, this Court has held that principles of state contract law provide the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA. *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' "); *see also, Green Tree*, 539 U.S. at 447 (2003) (the question of contract interpretation is "a matter of state law. .").

This Court has repeatedly confirmed that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any

dispute which he has not agreed to so submit." *Hawsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588 (2002) (citations and internal quotations omitted). When parties voluntarily enter into a contract whereby they agree to follow state law, the state law is not preempted. *See, Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995). The parties may contract that otherwise-preempted state law will govern a dispute over an arbitration clause, and a court must analyze the dispute under that state law. *Id.*, 513 U.S. at 228. Hostility to negotiated arbitration provisions cannot justify blindness to a plain intent of parties to adopt arbitration for settlement of their disputes. "Nor should such an agreement of parties be frustrated by judicial 'interpretation' of contracts." *United States v. Moorman*, 338 U.S. 457, 462, 70 S. Ct. 288, 291(1950). "If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." *Id.* As such, this Court should respect the Parties' rights to contract, including to agree to how to resolve their disputes and that State law will govern the analysis.[3]

CONCLUSION

This Court should respect the manifest intent of Congress and the specific intent of the Parties to leave to the State of California the power to decide and

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[3] As the signatories to this brief have been advised that other *amici curiae* will be writing to this Court regarding contract interpretation relating to the Parties' arbitration agreement, those issues are not addressed herein.

resolve matters relating to the enforceability of arbitration agreements made pursuant to that State's laws. Failure to do so will not only violate the intent of Congress in enacting the FAA, but will also violate the well-established principles of federalism ensured by the Constitution. Therefore, this Court should hold that reference to State law in the arbitration provision in the contract at issue permits the State Court to examine the agreement in accordance with that State law.

Respectfully submitted this 24th day of July, 2015,

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No. 14-462

In the Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

—v—

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF OF PROFESSOR PETER LINZER AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. GIVEN THAT THE PETITIONER ASKS THE COURT TO SIGNIFICANTLY EXTEND THE FAA, THAT CONGRESS HAS DELEGATED THE REVISION OF PRE-DISPUTE CONSUMER COMPULSORY ARBITRATION CONTRACTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU, AND THAT THE CFPB IS DELIBERATING REVISION OF COMPULSORY CONSUMER ARBITRATION CONTRACTS, PARTICULARLY WITH RESPECT TO CLASS ACTIONS, THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED 4

CONCLUSION 9

APPENDIX

Dodd-Frank Wall Street Reform And Consumer Protection Act Of 2010, § 1028, 12 U.S.C. § 5518 10

TABLE OF AUTHORITIES

Page

CASES

Allied-Bruce Terminix Cos., Inc. v. Dobson,
513 U.S. 265 (1995) 4, 5

AT&T Mobility, LLC v. Concepcion,
563 U.S. ___, 131 S. Ct. 1740 (2011) 3

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 4

Imburgia v. DirectTV, Inc.,
225 Cal. App. 4th 338 (2014) 5

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 4, 5

Rent-A-Center West v. Jackson,
561 U.S. 63, 70 (2010) 5

Swift v. Tyson,
16 Peters (41 U.S.) 1 (1842) 4

STATUTES

Dodd-Frank Act, § 1028,
12 U.S.C. § 5518 ..... 2, 6, 8

Federal Arbitration Act,
9 U.S.C. § 1, et seq ..... passim

JUDICIAL RULES

Sup. Ct. R. 37.3 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Consumer Financial Protection Bureau, *Arbitration Study, March 2015* 6

Consumer Financial Protection Bureau, *Fact Sheet on Arbitration Study*, http://files.consumerfinance.gov/f/2013503_cfpb_factsheet_arbitration-study.pdf (visited July 23, 2015)..... 7

Corbin on Contracts (rev. ed., Peter Linzer, ed. 2010, Joseph M. Perillo, General Editor) 1

Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1229 (1979) 1

Restatement (Second) of Contracts (1981) 1

Restatement (Third) of Restitution and Unjust Enrichment (2011) 1

Time Magazine, *CFPB Says Mandatory Arbitration is Bad for Consumers*, http://time.com/money/3737274/cfpb_mandatory_arbitration_banks_credit_cards/ (visited July 23, 2015) 7

INTEREST OF THE *AMICUS CURIAE*

The *amicus curiae* is a Professor of Law at the University of Houston Law Center, where he has taught Contracts, Contract Drafting and Constitutional Law for thirty-two years.[1] He is a former Chair of the Contracts Section of the Association of American Law Schools and an Elected Member of the American Law Institute. He was Editorial Reviser of the Restatement Second of Contracts (1981) and a member of the Members Consultative Group of the Restatement Third of Restitution and Unjust Enrichment (2011). He has written extensively on contracts of adhesion and, in particular, the Court's jurisprudence with respect to the Federal Arbitration Act. *See, e.g.*, 6 *Corbin on Contracts* §§ 26.5-.6, at 461-88 (rev. ed., Peter Linzer, ed. 2010, Joseph M. Perillo, General Editor). His concerns include certiorari policy, *see* Linzer, *The Meaning of Certiorari Denials,* 79 COLUM. L. REV. 1229 (1979); statutory and contract interpretation; and the relation of the Court to Congress, the States and federal administrative agencies. He is concerned that a hasty decision by this Court would be disrespectful to Congress and a

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[1] Blanket letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for the *amicus curiae* states that no counsel for a party authored this brief in whole or part and that no party other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

The *amicus*'s affiliation with the University of Houston is included for identification purposes only, and does not imply that the positions in this brief are on behalf of it.

possible source of conflict between the Court and the Consumer Financial Protection Bureau, to which Congress has delegated the issues involved here.

SUMMARY OF ARGUMENT

The Court has stated its awareness that the Congress that enacted the Federal Arbitration Act in 1925 acted twelve years before the expansion of the Commerce Power and was dealing with a procedural innovation typically negotiated between parties represented by counsel in business transactions, and then resisted by conservative courts, legislatures and counsel. While the Court has recognized that many of its decisions have arguably gone beyond Congress's original intent, it has relied on later Congresses' unwillingness to amend the FAA to overrule the Court. But Congress, after considerable debate, in Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), 12 U.S.C. § 5518, directed the Consumer Financial Protection Bureau ("CFPB") to study compulsory consumer financial service arbitration agreements and to "prohibit or impose conditions" on them, consistent with its study. In March of this year the CFPB issued its study and is now receiving comments on it, preparatory to deciding its substantive regulation of compulsory consumer financial service arbitration agreements. One of its major findings was that arbitration clauses act as a barrier to class actions.

This case involves exactly that issue. In 2007 Petitioner, DIRECTV, authored a contract of adhesion with Respondent that in its Section 9 called for compulsory arbitration and forbade class arbitration, but also provided that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." There is no dispute that at the time the adhesion contract was entered into California case law forbade class action waivers in consumer contracts. Nonetheless, Petitioner urges this Court to override California law because of its decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011), decided four years after Petitioner wrote the arbitration clauses, and to extend federal control of arbitration contracts to disturb the California courts' rulings on contract interpretation. It asks the Court to do this despite Congress's delegation to the CFPB, and despite the expectation that the CFPB will issue new regulations dealing with just the sort of consumer arbitration contract involved in this case.

It is respectfully submitted that the Court should dismiss the writ of certiorari as improvidently granted and avoid the potential for conflict with Congress and the CFPB. In addition, this will avoid the intrusion on federalism that would be caused by this Court directing a State court to interpret a provision in light of a ruling by this Court that was not made until four years after the Petitioner wrote the contract.

ARGUMENT

I. GIVEN THAT THE PETITIONER ASKS THE COURT TO SIGNIFICANTLY EXTEND THE FAA, THAT CONGRESS HAS DELEGATED THE REVISION OF PRE-DISPUTE CONSUMER COMPULSORY ARBITRATION CONTRACTS TO THE CONSUMER FINANCIAL PROTECTION BUREAU, AND THAT THE CFPB IS DELIBERATING REVISION OF COMPULSORY CONSUMER ARBITRATION CONTRACTS, PARTICULARLY WITH RESPECT TO CLASS ACTIONS, THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

It is well understood that the Congress that wrote the Federal Arbitration Act in 1925 did so before the expansion of the Commerce Power in 1937 or the overruling of *Swift v. Tyson*, 16 Peters (41 U.S.) 1 (1842), by *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). Nonetheless, this Court has given the FAA a wide expansion. The early expansions appear justified, as in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), which involved not a consumer contract of adhesion, as in this case, but a negotiated consultation agreement entered into as part of a corporate buy-out and which included an arbitration clause presumably negotiated by both parties' lawyers. In fact, in a footnote to the majority opinion, Justice Fortas wrote that "[w]e note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power

are expressly excluded from the reach of the Act." *Id.* at 402 n. 9. Later cases, however, extended the FAA to consumer, franchise and employment contracts usually involving contracts of adhesion. The Court has justified its position based both on Congress's "enact[ing] legislation extending, not retracting, the scope of arbitration," *Allied-Bruce Terminix*, *supra*, at 272, and on parties' failure to ask the Court to overrule expansive prior cases. See, *e.g.*, *Rent-A-Center West v. Jackson,* 561 U.S. 63, 70 (2010).

Petitioner seeks to have this Court extend the FAA to overrule a state's law on contract interpretation. In 2007 DIRECTV wrote the contract of adhesion entered into between the parties and inserted the words "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." *Imburgia v. DirectTV, Inc.*, 225 Cal. App. 4th 338, 341 (2014). It seems clear that in 2007 the law of California forbade a waiver of class action, and it appears to be a matter of state law to interpret a contract provision as of the time it is entered into. (In the California Court of Appeal's note 2 it says, referring to a different provision of section 9 of the 2007 agreement, "The United States Supreme Court did not decide that issue until 2008, however, so its bearing on the 2007 customer agreement is not entirely clear.") It is one thing for this Court to rule that the FAA preempts a provision of state law. It is another to apply the holding of a future decision on the FAA to the interpretation of a contract provision written before the decision was made. That is a further extension of the FAA, and while the Court has relied on Congress's inaction in the past, there is

strong reason not to make a claim of *stare decisis* with respect to further extensions of the FAA today.

Congress has indicated in section 1028 of the Dodd-Frank Act its willingness to see the overhauling of the FAA in consumer financial matters, and the CFPB's March 2015 *Arbitration Study* found that with respect to class actions, like this case, arbitration clauses have been widely used not as a low-cost substitute for judicial litigation, but largely just to block the class actions. In contrast, when companies were sued individually, they almost always allowed the case to be heard in courts. The CFPB summarized its findings as follows:

> **Arbitration clauses can act as a barrier to class actions:** By design, arbitration clauses can be used to block class actions in court. The CFPB found that it is uncommon for a company to try to force an individual lawsuit into arbitration but common for arbitration clauses to be invoked to block class actions. For example, in cases where credit card issuers with an arbitration clause were sued in a class action, the companies invoked the arbitration clause to block class actions 65 percent of the time. Of the 1,200 individual lawsuits the CFPB examined that were filed between 2010 and 2012, companies invoked arbitration less than one percent of the time.
>
> - **Most arbitration agreements prohibit class arbitrations:** Over 90 percent of the arbitration agreements the CFPB studied expressly prohibited class

> arbitrations. Those that did not have this express prohibition were from smaller companies that together represented 3 percent or less of their markets.
>
> - **Class arbitrations were minimal.** Only two class arbitrations were filed with the AAA between 2010 and 2012. One was not pursued at all and the other had a motion to dismiss pending as of September 2014.
>
> **No evidence of arbitration clauses leading to lower prices for consumers.** The CFPB looked at whether companies that include arbitration clauses in their contracts offer lower prices because they are not subject to class action lawsuits. The CFPB analyzed changes in the total cost of credit paid by consumers of some credit card companies that eliminated their arbitration clauses and of other companies that made no change in their use of arbitration provisions. The CFPB found no statistically significant evidence that the companies that eliminated their arbitration clauses increased their prices or reduced access to credit relative to those that made no change in their use of arbitration clauses.

http://files.consumerfinance.gov/f/2013503_cfpb_factsheet_arbitration-study.pdf (visited July 23, 2015). Time Magazine's on-line bulletin about the CFPB Study was headlined *CFPB Says Mandatory Arbitration is Bad for Consumers*, http://time.com/

money/3737274/cfpb_mandatory_arbitration_banks_credit_cards/ (visited July 23, 2015)

Section 1028 of the Dodd-Frank Act undermines the stare decisis argument that Congress would tacitly approve a further extension by the Court of the reach of the FAA into State powers. The CFPB's Report to Congress strongly suggests that it will restrict the use of arbitration clauses to strangle class actions, particularly since their use as barriers rather than as low-cost means of dispute resolution is a development that is contrary to what the FAA stands for, and is certainly nothing that the 1925 Congress would have approved of had it been prescient enough to see ninety years into the future. For this Court to accept Petitioner's invitation to move still further into the state prerogative of contract interpretation is to ignore both Congress and the agency that it created and delegated this issue to.

CONCLUSION

With respect, it is submitted that the best solution to this conflict is to avoid it, by dismissing the writ of certiorari as improvidently granted.

Respectfully submitted,

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APPENDIX

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, § 1028, 12 U.S.C. § 5518

SEC. 1028. AUTHORITY TO RESTRICT MANDATORY PRE-DISPUTE ARBITRATION

(a) STUDY AND REPORT.–The Bureau shall conduct a study of, and shall provide a report to Congress concerning the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.

(b) FURTHER AUTHORITY.–The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

(c) LIMITATION.–The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.

(d) EFFECTIVE DATE.–Notwithstanding any other provision of law, any regulation prescribed by

the Bureau under subsection (b) shall apply, consistent with the terms of the regulation, to any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the effective date of the regulation, as established by the Bureau.

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IN THE

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ON WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
SECOND DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE PRE-*CONCEPCION* ARBITRATION AGREEMENT AT ISSUE DOES NOT INDICATE AN INTENT TO DISPLACE THE FEDERAL ARBITRATION ACT BECAUSE THE FAA WAS UNDERSTOOD AT THAT TIME TO DEFER TO STATE CONTRACT LAW ON THE ISSUE OF CLASS ARBITRATION WAIVERS. 4

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) ..... *passim*

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 9

Imburgia v. DIRECTV, Inc.,
170 Cal. Rptr. 3d 190 (Cal. Ct. App. 2014) 5, 6, 8

Kinkel v. Cingular Wireless LLC,
857 N.E.2d 250 (Ill. 2006) 7

Scott v. Cingular Wireless,
161 P.3d 1000 (Wash. 2007) 7

Shroyer v. New Cingular Wireless Servs., Inc.,
498 F.3d 976 (9th Cir. 2007) 6

Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,
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319 F.3d 1126 (9th Cir. 2003) 7

STATUTES

9 U.S.C. §§ 1-16 ..... 1, 2, 4

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the question presented in this case: In an arbitration agreement falling under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), does a reference to state law with respect to the enforceability of a class arbitration waiver displace the FAA's mandate to enforce such a waiver?[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed to enforcing arbitration agreements according to their terms, and to

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amicus also states that counsel of record for the petitioner and for the respondent have filed with the Court their respective blanket consent letters, consenting to the filing of amicus curiae briefs in support of either or neither party.

encouraging the arbitration of individual disputes as a viable alternative to litigation in court. NELF is also committed to upholding the supremacy of federal law over conflicting state law. In this case, amicus is committed to holding state courts accountable to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), which preempts any state law or rule of decision that interferes with "[t]he overarching purpose of the FAA to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). In particular, NELF is committed to enforcing the FAA's mandate that class arbitration waivers should be enforced, notwithstanding any state law to the contrary.

In addition to this amicus brief, NELF has filed many other related amicus briefs in this Court, arguing for the enforcement of arbitration agreements according to their plain terms under the FAA.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

In the 2007 arbitration agreement at issue here, a reference to state law with respect to the

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[2] *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

enforceability of a class arbitration waiver does not displace the Federal Arbitration Act's mandate to enforce such a waiver. The reference to "the law of your state" in the 2007 agreement's jettison clause was not *intended* to displace the application of the FAA to the class arbitration waiver. Quite to the contrary, this language actually indicates an intent to comply with the FAA, as it was generally understood in 2007. The agreement antedates *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), at a time when the FAA's saving clause was widely misinterpreted as allowing "the law of your state" to decide whether a class arbitration waiver was enforceable, typically via the general contract defense of unconscionability. And so, compliance with the FAA in 2007 was understood as requiring compliance with a state's generally applicable contract law on the issue of class action waivers.

The 2007 agreement clearly reflects this pre-*Concepcion* assumption that the FAA allowed state contract law to decide the validity of a class waiver. Indeed, the jettison clause begins with the assumption that state law applies to the issue: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable " This is not a choice-of-law clause. It does not recite that state law shall apply to the class waiver, let alone recite that state law shall apply to the exclusion of federal law. Instead, the clause treats the applicability of state law to the class waiver as a given, consistent with the pre-*Concepcion* view of the FAA.

The real purpose of the jettison clause was to address the perceived *consequences*, in 2007, if applicable state law were to invalidate the class waiver: " then this entire [arbitration agreement] is unenforceable." The purpose of the jettison clause, then, was not to displace the FAA but instead to protect DIRECTV from the perceived risk of mandatory class arbitration at the time.

Since "the law of your state" was not intended to oust the FAA, and since "the law of your state" cannot, after *Concepcion*, obstruct the enforcement of a class arbitration waiver, DIRECTV's motion to compel the arbitration of Imburgia's individual claims should be allowed.

ARGUMENT

THE PRE-*CONCEPCION* ARBITRATION AGREEMENT AT ISSUE DOES NOT INDICATE AN INTENT TO DISPLACE THE FEDERAL ARBITRATION ACT BECAUSE THE FAA WAS UNDERSTOOD AT THAT TIME TO DEFER TO STATE CONTRACT LAW ON THE ISSUE OF CLASS ARBITRATION WAIVERS.

At issue is whether, in a 2007 arbitration agreement falling under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), a reference to state law with respect to the enforceability of a class arbitration waiver displaces the FAA's mandate to enforce such a waiver. Did the parties to the disputed agreement intend to elevate state law over the FAA on the subject of class arbitration waivers? The answer to this question is no, as amicus argues in detail below.

The arbitration provision at issue is contained within satellite television provider DIRECTV's 2007 customer agreement with Amy Imburgia. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 193 (Cal. Ct. App. 2014). The agreement requires the binding arbitration of any future disputes and prohibits classwide procedures. *Id.*[3] While the agreement recites that its arbitration provision "shall be governed by the Federal Arbitration Act," *id.*, it also indicates that enforcement of the class waiver will depend on the law of each customer's state: "If, however, *the law of your state* would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration agreement] is unenforceable." *Id.* (emphasis added).

The California Court of Appeal interpreted "the law of your state" as referring to the law of California to the exclusion of federal law. *See Imburgia*, 170 Cal. Rptr. 3d at 195-98. That is, the lower court interpreted this contractual language, from 2007, to oust the FAA's mandate to enforce the class arbitration waiver, as announced four years later in *AT&T Mobility LLC v. Concepcion*, 131 S.

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[3] The 2007 agreement provides, in relevant part:

> [A]ny Claim either of us asserts will be resolved only by binding arbitration. . Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity.

Imburgia, 170 Cal. Rptr. at 193.

Ct. 1740 (2011). Accordingly, the lower court invalidated the class arbitration waiver under a provision of California law that bars individuals from waiving their right to pursue a class action for consumer-related claims. *See Imburgia,* 170 Cal. Rptr. 3d at 194. Consequently, the lower court gave effect to the agreement's nonseverability or jettison clause, quoted above, and voided the entire arbitration agreement. As a result, the court denied DIRECTV's motion to compel the arbitration of Imburgia's individual claims. *See id.* at 198.

The lower court misinterpreted the reference to "the law of your state" in the 2007 agreement's jettison clause. This contractual language was hardly intended to displace application of the FAA to the class arbitration waiver. Quite to the contrary, this language actually indicates an intent to *comply* with the FAA, as it was generally understood at the time. The agreement antedates *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), at a time when the FAA's saving clause[4] was widely misinterpreted as allowing "the law of your state" to decide whether a class arbitration waiver was enforceable, typically via the general contract defense of unconscionability.[5] And so, compliance with the

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[4] Under the FAA's saving clause, courts may invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability " *Concepcion*, 131 S. Ct. at 1746 (citation and internal quotation marks omitted).

[5] *See, e.g., Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007) ("The Federal Arbitration Act

FAA in 2007 was understood as requiring compliance with a state's generally applicable contract law on the issue of class action waivers.

Accordingly, reference to both the FAA and "the law of your state" in the 2007 agreement is entirely consistent with the dominant pre-

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does not bar federal or state courts from applying generally applicable state contract law principles and refusing to enforce an unconscionable class action waiver in an arbitration clause."); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) ("Because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA."); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008 (Wash. 2007) ("Congress [in § 2 of the FAA] simply requires us to put arbitration clauses on the *same* footing as other contracts, not make them the special favorites of the law. . . [C]ontracts that effectively exculpate their drafter from liability under [state consumer protection law] for broad categories of liability are not enforceable in Washington, even if they are embedded in an arbitration clause. The arbitration clause is irrelevant to the unconscionability."); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 263 (Ill. 2006) ("[T]he FAA neither expressly nor impliedly preempts a state court from holding that an arbitration clause or a specific provision within an arbitration clause is unenforceable[.] Because our analysis on the question of class action waivers is applicable to all contracts governed by Illinois law, it can be applied to render the class action waiver in an arbitration clause unenforceable without undermining the goals and policies of the FAA."); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735, 1751 (2006) ("[D]ue to this 'saving clause,' federal law favors enforcement of [arbitration] agreements according to their terms insofar as--but only insofar as--those terms are enforceable as a matter of generally applicable state contract law. [T]he unconscionability doctrine remains a potential sword with which to attack class action waivers.").

Concepcion view that the FAA allowed state law to decide whether a class arbitration was enforceable. Indeed, the jettison clause begins with the *assumption* that state law determines the validity of the class waiver: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable ." *Imburgia*, 170 Cal. Rptr. at 193. This is not a choice-of-law clause. It does not recite that state law shall apply to the class waiver, let alone recite that state law shall apply to the exclusion of federal law. Instead, the clause treats the applicability of state law as a given, consistent with the pre-*Concepcion* view of the FAA.

The real purpose of the jettison clause was to address the perceived *consequences*, in 2007, if applicable state law were to invalidate the class waiver: " then this entire [arbitration agreement] is unenforceable." *Imburgia*, 170 Cal. Rptr. at 193. The purpose of the jettison clause, then, was not to displace the FAA but instead to protect DIRECTV from the perceived risk of mandatory class arbitration at the time.[6]

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[6] *See* Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 Entrepreneurial Bus. L.J. 275, 278 (2009) ("As long as the invalid [class arbitration] waiver is severable from the parties' arbitration agreement, the case will still proceed in arbitration --but on a class basis rather than an individual basis. However, an increasing number of . form contracts now include nonseverability provisions in their arbitration clauses, specifying by contract that if the class arbitration waiver is held invalid, the entire arbitration clause is unenforceable. The result of such a clause, in those jurisdictions holding class arbitration waivers invalid, is that any class claim within the scope of the arbitration clause would proceed as a putative

Concepcion, of course, has since rejected the basic assumption of this 2007 jettison clause that the FAA allows state law to decide whether a class

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class action in court."); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Cases*, 41 U. Mich. J.L. Reform 871, 884 (2008) ("[I]n 60 percent of the consumer contracts that contained mandatory arbitration clauses, companies' standard form contracts deemed those clauses void if the arbitration process allows for class action activity.").

This erroneous belief in mandatory class arbitration was perhaps due to a widespread misinterpretation of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion), which the Court later addressed and corrected in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680-81 (2010). According to that misreading, *Bazzle* had recognized an implied right to class arbitration in any arbitration agreement governed by the FAA, which the drafting party would need to overcome with express contract language forbidding class arbitration. *See Stolt–Nielsen*, 559 U.S. at 680-81 (discussing same). *See also* William G. Whitehill, *Class Actions and Arbitration Murky Waters: Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 4 World Arb. & Mediation Rev. 1, 9-10 (2010), *available* at http://www.gardere.com/Binaries/Press%20and%20Publications/WAMRWhitehill.pdf (last visited June 5, 2015) (same); Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435, 524-25 (2011) (same).

Therefore, if a class waiver were invalidated under state contract law, pre-*Concepcion*, a claimant's purported presumptive right to class arbitration that was misattributed to *Bazzle* might remain undisturbed and intact in the remaining terms of the arbitration agreement. Without a jettison clause, then, the drafting party could face the undesirable prospect of mandatory class arbitration if the class waiver were invalidated under a state's general contract law, or so it was believed back then.

arbitration waiver is enforceable. In *Concepcion*, the Court held that the FAA requires the enforcement of a class arbitration waiver that is contained in a valid arbitration agreement, notwithstanding any state law to the contrary. *See Concepcion*, 131 S. Ct. at 1748.[7] After *Concepcion*, then, it is clear that "the law of your state" has no effect on the enforcement of such a waiver. Therefore, the disputed "law of your state" language in this 2007 agreement is now a meaningless artifact from the pre-*Concepcion* era.[8]

In sum, the reference to "the law of your state" in the 2007 agreement was not intended to oust the FAA. To the contrary, this contractual language actually indicates compliance with the FAA as it was

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[7] "Although [the FAA's] saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. That is, invalidating a class waiver, even under a generally applicable contract defense, would *require* class arbitration as a condition for the enforcement of the arbitration agreement. And requiring class arbitration would, in turn, contravene "[t]he overarching purpose of the FAA . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id. See also id.* ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

[8] In addition to *Concepcion*, *Stolt–Nielsen* has also obviated the need for a jettison clause in an agreement governed by the FAA. Under *Stolt-Nielsen*, there is no implied right to class arbitration. *See Stolt-Nielsen*, 559 U.S. at 685. Instead, the FAA requires a contractual basis that the parties consented to class arbitration. *See id.* at 684. A class arbitration waiver clearly defeats any contractual basis authorizing class arbitration.

understood at the time. The wording merely acknowledges that the law of each customer's state would determine the validity of the class arbitration waiver at the time. Since "the law of your state" was not intended to supplant the FAA, and since "the law of your state" cannot, after *Concepcion*, obstruct the enforcement of a class waiver, DIRECTV's motion to compel the arbitration of Imburgia's individual claims should be allowed.

CONCLUSION

For the reasons stated above, amicus respectfully requests that this Court reverse the judgment of the Court of Appeal of California.

Respectfully submitted,

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No. 14-462

In the

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, et al.,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE .	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE PREEMPTED *DISCOVER BANK* RULE HAS NO LEGAL EFFECT ON JUDICIAL CONSTRUCTION OF ARBITRATION CONTRACTS	4
A. Preempted Common Law Rules Are as Moribund as Preempted Statutes; They May Not Be Resurrected	4
1. The Meaning and Effect of Preempted State Common Law Rules	6
2. Other Preempted Common Law Rules and Statutes Are Considered Nullified, Even by California Courts	10
B. California's *Discover Bank* Rule, Invalidating Class-Action Waivers as "Unconscionable," Can Have No Effect in the Construction of Any Arbitration Contract	15

TABLE OF CONTENTS—Continued

	Page
II. CALIFORNIA COURTS MUST NOT ISOLATE THE STATE'S RESIDENTS FROM THE BENEFITS THEY SEEK TO OBTAIN FROM THE FEDERAL ARBITRATION ACT	19
III. CALIFORNIA'S INTRANSIGENCE INFECTS OTHER STATES	21
CONCLUSION	25

TABLE OF AUTHORITIES

Page

Cases

Abbott v. U.S.,
562 U.S. 8 (2010) 10

Abdullah v. American Airlines, Inc.,
181 F.3d 363 (3d Cir. 1999) 5

Aceros Prefabricados, S.A. v. TradeArbed, Inc.,
282 F.3d 92 (2d Cir. 2002) 18

Akopyan v. Wells Fargo Home Mortg., Inc.,
215 Cal. App. 4th 120 (2013),
rev. denied (Jun. 26, 2013) 13-14

American Exp. Co. v. Italian Colors Rest.,
133 S. Ct. 2304 (2013) 3, 4, 16, 20, 24

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) passim

Attocknie v. Carpenter Mfg., Inc.,
901 P.2d 221 (Okla. App. 1995) 6

Broughton v. Cigna Healthplans of Cal.,
21 Cal. 4th 1066 (1999) 15-16

Brown ex rel. Brown v. Genesis Healthcare Corp.,
228 W. Va. 646 (2011), *judgment vacated sub nom, Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) 22

California ARCO Distributors, Inc. v. Atlantic Richfield Co., 158 Cal. App. 3d 349 (1984) 16

CarMax Auto Superstores Cal., LLC v. Fowler,
134 S. Ct. 1277 (2014) 20

TABLE OF AUTHORITIES—Continued

	Page
Carter v. SSC Odin Operating Co., LLC, 237 Ill. 2d 30 (2010)	12
Cipollone v. Liggett Grp., Inc., 789 F.2d 181 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987)	5
Clay v. Permanente Med. Grp., Inc., 540 F. Supp. 2d 1101 (N.D. Cal. 2007)	9-10
Cleveland By and Through Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir. 1993)	5
Cruz v. PacifiCare Health Sys, Inc., 30 Cal. 4th 303 (2003)	15-16
De La Cuesta v. Fidelity Sav. & Loan Ass'n, 121 Cal. App. 3d 328 (1981)	11
Discover Bank v. Shea, 827 A.2d 358 (N.J. Super. Ct. Law Div. 2001), *app. dismissed*, 827 A.2d 292 (N.J. Super. App. Div. 2003)	22
Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005)	2-4, 15, 17-18, 20
D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308 (D. Conn. 2011)	3
Episcopal Church in Micronesia v. Chung Kuo Ins. Co., Ltd., No. 84-0001, 1985 WL 56588 (D. Guam June 28, 1985)	22
Farmers Educ. and Coop. Union of Am., N.D. Div. v. WDAY, Inc., 360 U.S. 525 (1959)	8

TABLE OF AUTHORITIES—Continued

	Page
Feeney v. Dell Inc., 454 Mass. 192 (2009)	23
Feeney v. Dell Inc., 465 Mass. 470 (2013)	23
Feeney v. Dell Inc., 466 Mass. 1001 (2013)	24
Ferguson v. Corinthian Colleges, Inc., 733 F.3d 928 (9th Cir. 2013)	15
Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982)	10-11
First Gibraltar Bank, FSB v. Morales, 42 F.3d 895 (5th Cir. 1995)	19
Gentry v. Superior Court, 42 Cal. 4th 443 (2007)	21
Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)	1
Hines v. Davidowitz, 312 U.S. 52 (1941)	7
Huntington Int'l Corp. v. Armstrong World Indus. Inc., 981 F. Supp. 134 (E.D. N.Y. 1997)	17-18
Imburgia v. DIRECTV, Inc., 225 Cal. App. 4th 338 (2014)	2
In re Farmers Markets, Inc., 792 F.2d 1400 (9th Cir. 1986)	9
In re Schwartz-Tallard, 765 F.3d 1096 (9th Cir. 2014), *reh'g en banc granted*, 774 F.3d 959 (2014)	9
In re Walsh, 219 B.R. 873 (9th Cir. B.A.P. 1998)	9

TABLE OF AUTHORITIES—Continued

	Page
Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987)	5
Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991)	8
Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015)	3
James v. Conceptus, Inc., 851 F. Supp. 2d 1020 (S.D. Tex. 2012)	21
King v. Hoke, 825 F.2d 720 (2d Cir. 1987)	9
Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006)	22
Linder & Assocs., Inc. v. Aetna Cas. & Sur. Co., 166 F.3d 547 (3d Cir. 1999)	17
Little v. Auto Stiegler, Inc., 29 Cal. 4th 1064 (2003)	20
Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co., 369 U.S. 95 (1962)	17
Maryland v. Louisiana, 451 U.S. 725 (1981)	7
Matter of Marlene Indus. Corp. (Carnac Textiles), 45 N.Y.2d 327 (1978)	17-18
McCulloch v. Maryland, 4 Wheat. 316 (1819)	6-7

TABLE OF AUTHORITIES—Continued

	Page
McGill v. CitiBank, N.A., 345 P.3d 61 (Cal. 2015)	16
McKenzie Check Advance of Fla., LLC v. Betts, 112 So. 3d 1176 (Fla. 2013)	3
Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 2014 WL 4459129 (N.Y. App. Div. Sept. 11, 2014)	22
Murphy v. DirecTV, Inc., 724 F.3d 1218 (9th Cir. 2013)	3
Mutual Pharm. Co., Inc. v. Bartlett, 133 S. Ct. 2466 (2013)	7
Naegele v. Albers, 940 F. Supp. 2d 1 (D.D.C. 2013)	22
Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997)	8
Northeast Sav., F.A. v. Dir., Office of Thrift Supervision, 770 F. Supp. 19 (D.C. D.C. 1991)	8
Northwest v. Ginsberg, 134 S. Ct. 1422 (2014)	4-5
Oneok, Inc. v. Learjet, Inc., 2015 WL 1780926 (U.S. Supreme Ct. Apr. 21, 2015)	9
Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013)	1
Perry v. Thomas, 482 U.S. 483 (1987)	20

TABLE OF AUTHORITIES—Continued

	Page
Phillips Petroleum Co. v. Arco Alaska, Inc., No. 7177, 1986 WL 7612 (Del. Ch. July 9, 1986)	22
Preston v. Ferrer, 552 U.S. 346 (2008)	1, 20
Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42 (2d Cir. 1993)	17
Pub. Utilities Comm'n of State of Cal. v. U.S., 355 U.S. 534 (1958)	6
Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221 (3d Cir. 2012)	18
Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010)	1
San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236 (1959)	6
Sanchez v. Lindsey Morden Claims Services, Inc., 72 Cal. App. 4th 249 (1999), *rev. denied* (Jul. 28, 1999)	15
Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972)	9
Sec. Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322 (2d Cir. 2004)	22
Sonic-Calabasas A, Inc. v. Moreno, 132 S. Ct. 496 (2011)	20
Southland Corp. v. Keating, 465 U.S. 1 (1984)	19

TABLE OF AUTHORITIES—Continued

	Page
State v. Hobson, 218 Wis. 2d 350 (1998)	8
Sternberg v. Johnson, 595 F.3d 937 (9th Cir. 2010)	9
Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)	1
Taylor v. Gen. Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990)	5
Thibodeau v. Comcast Corp., 912 A.2d 874 (Pa. Super. Ct. 2006)	18
Triad Sys. Fin. Corp. v. Stewart's Auto Supply, Inc., 47 F. Supp. 2d 1332 (N.D. Ala. 1999)	21
U.S. v. Bryant, 769 F.3d 671 (9th Cir. 2014)	16
U.S. v. Sparks, 711 F.3d 58 (1st Cir.), *cert. denied*, 134 S. Ct. 204 (2013)	10
U.S. v. Tejada, 631 F.3d 614 (2d Cir. 2011)	10
Wallace v. Ganley Auto Grp., 2011-Ohio-2909 (Ohio App. 2011)	4
Wellenkamp v. Bank of Am., 21 Cal. 3d 943 (1978)	10
Welton v. City of Los Angeles, 18 Cal. 3d 497 (1976)	16

TABLE OF AUTHORITIES—Continued

	Page
Yarick v. PacifiCare of Cal., 179 Cal. App. 4th 1158 (2009)	12-13
Constitutions	
U.S. Const., art. I, § 8, cl. 4	9
U.S. Const., art. VI, cl. 2	3, 6
Statutes	
42 U.S.C. § 1395w-26(b)(3)	12
Cal. Civ. Code § 1751	3
Rules	
Sup. Ct. R. 37	1
Sup. Ct. R. 37.3(a)	1
Sup. Ct. R. 37.6	1
Miscellaneous	
Black's Law Dictionary (10th ed. 2014)	8
Rau, Alan Scott, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435 (2011)	15

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, DIRECTV, Inc.[1] Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases in this Court, the California courts, and many other state supreme courts involving the Federal Arbitration Act (FAA) and contractual arbitration in general. *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); and *Preston v. Ferrer*, 552 U.S. 346 (2008).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amy Imburgia's contract with DIRECTV included a provision that any disputes would be resolved "only by binding arbitration" and that the parties would not "arbitrate any claim as a representative member of a class or in a private attorney general capacity." It further stated that "[i]f, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section [providing for arbitration] is unenforceable." Finally, it states that the arbitration provisions "shall be governed by the Federal Arbitration Act." *Imburgia v. DIRECTV, Inc.*, 225 Cal. App. 4th 338, 341-42 (2014).

In 2008, Imburgia filed a putative class action against DIRECTV, claiming violations of various California laws related to DIRECTV's assessment of early termination fees. *Id.* at 340. At that time, the rule created by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), was effectively invalidating all class action waivers in consumer contracts, deeming them unconscionable. DIRECTV did not move to compel arbitration, as it would have been futile under California law. In 2011, the legal landscape changed dramatically when this Court held the *Discover Bank* rule preempted in *Concepcion*, 131 S. Ct. 1740. DIRECTV immediately moved to compel arbitration, *Imburgia*, 225 Cal. App. 4th at 341, but the trial court denied the motion, based on the contract's "law of your state" provision above. The court of appeal affirmed, holding that it had to consider the law of the state, without regard to whether it was preempted. *Id.* at 347.

In so doing, the court below fundamentally misunderstood the meaning and effect of federal preemption. Under the Supremacy Clause, state law—whether statutory or common law—must yield completely when it is preempted by federal law. U.S. Const., art. VI, cl. 2 (the laws of the United States "shall be the supreme Law of the Land any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." In *Concepcion*, this Court expressly held the *Discover Bank* rule preempted, rendering it a legal nullity upon which no court or party may rely. As the Ninth Circuit held in *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013), "Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, *is* the law of California and of every other state."[2]

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[2] The court below did not explicitly rest its decision on *Discover Bank*, citing both that case as well as an anti-waiver provision in the Consumers Legal Remedies Act, Cal. Civ. Code § 1751. Amicus does not address that statute directly because the Question Presented in this case focuses on the lower court's broad holding that it must review contract language referring to state law without regard to whether that state law is preempted. In any event, *Concepcion*'s holding has already been held, even in California, to apply to class action waivers outside the consumer context presented in that case and in *Discover Bank*. *See, e.g.*, *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 364 (2014), *cert. denied*, 135 S. Ct. 1155 (2015) ("Under the logic of *Concepcion*, the FAA preempts *Gentry*'s rule against employment class waivers."); *McKenzie Check Advance of Florida, LLC v. Betts*, 112 So. 3d 1176, 1183, 1188 (Fla. 2013) (consumers' claims brought under a variety of consumer protection statutes, all of which permit class actions, nonetheless must be pursued through individual arbitration, per *Concepcion*); *D'Antuono v. Service Rd. Corp.*, 789 F. Supp. 2d 308, 322, 331 (D. Conn. 2011) (pre-*Italian Colors* case that relies on the fundamental principles set forth in

(continued...)

ARGUMENT

I

THE PREEMPTED *DISCOVER BANK* RULE HAS NO LEGAL EFFECT ON JUDICIAL CONSTRUCTION OF ARBITRATION CONTRACTS

A. Preempted Common Law Rules Are as Moribund as Preempted Statutes; They May Not Be Resurrected

A state cannot accomplish by common law what it would be forbidden to accomplish by statute. In *Northwest v. Ginsberg*, 134 S. Ct. 1422 (2014), this Court held that a claim for breach of the implied covenant of good faith and fair dealing based on Minnesota state law is preempted by the Airline Deregulation Act because "it seeks to enlarge the contractual obligations that the parties voluntarily adopt." The Airline Deregulation Act's "aim can be undermined just as surely by a state common-law rule as it can by a state statute or regulation." *Id.* at 1430. Parallel to the Federal Arbitration Act's promotion of

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[2] (...continued)
Concepcion to question the continued validity of the Second Circuit case later overruled in *Italian Colors* and holds, "this Court reads the *AT & T Mobility* decision as casting sigificant doubt on virtually *any* 'device [or] formula' which might be a vehicle for 'judicial hostility toward arbitration'") (citing *Concepcion*, 131 S. Ct. at 1747); *Wallace v. Ganley Auto Grp.*, 2011-Ohio-2909 ¶ 19 (Ohio App. 2011) (*Concepcion* demands courts uphold arbitration agreements even when they include statutory consumer protection claims that the state believes should be litigated as class action). That said, California courts continue to go to great lengths to cabin *Concepcion*, as discussed in Section II, *infra*.

the freedom of parties to contract for dispute resolution in the ways that best suits them, the Court noted that the federal policy promoted by the Airline Deregulation Act with regard to frequent flyer programs is to allow the free market to operate. *Id.* at 1433.

Ginsberg followed a long line of cases consistently holding that federal law preempts state law when the state law "interferes with the methods by which the federal statute was designed to reach [its] goal," *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987), whether the state law is rooted in a statute, regulation, or common law rule. *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) ("the duties imposed through state common law damage actions have the effect of requirements that are capable of creating 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' ") (citation omitted). *See also Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (The principle of preemption "applies whether the federal law is embodied in a statute or regulation, and whether the state law is rooted in a statute, regulation, or common law rule."); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 n.4 (3d Cir. 1999) ("State common law rules may be preempted in the same ways as state statutes or regulations.").

In short, the meaning of "state law" in preemption analysis includes not only the positive enactments of a state but also common law rules of liability as determined by state judicial decisions. *Cleveland By and Through Cleveland v. Piper Aircraft Corporation*, 985 F.2d 1438, 1441 (10th Cir. 1993). The reason statutes and common law rules are treated as

equivalent for purposes of preemption analysis is because both reflect public policy and both are intended to govern conduct. *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation is designed to be, a potent method of governing conduct and controlling policy."); *Attocknie v. Carpenter Mfg., Inc.*, 901 P.2d 221, 224 n.3 (Okla. App. 1995) ("[A] successful common-law tort action could have the effect of establishing a safety standard applicable to the same aspect of performance of a motor vehicle or item of motor vehicle equipment as that addressed by a federal standard.").

1. The Meaning and Effect of Preempted State Common Law Rules

The doctrine of federal preemption gives force to the Supremacy Clause of the Constitution by nullifying state laws that conflict with federal law. U.S. Const. art. VI, cl. 2. The very essence of supremacy removes all obstacles to its action within its own sphere, and thereby modifies every power vested in subordinate governments as to exempt federal operations from the states' influence. *Public Utilities Commission of State of Cal. v. U.S.*, 355 U.S. 534, 544 (1958) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819)). The meaning and effect of federal preemption has been phrased in a variety of ways, with the common theme that the preempted law or rule or statute is rendered ineffective.

In general, all state provisions that conflict with federal law are "without effect" or, in other words, a

"state statute is void to the extent it conflicts with a federal statute." *Maryland v. Louisiana*, 451 U.S. 725, 746-47 (1981) (citing *McCulloch*, 4 Wheat. at 427; *Hines v. Davidowitz*, 312 U.S. 52 (1941)). The Court applied this "without effect" definition in *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013). That case did not involve a statute; it involved New Hampshire's application of the common law tort duty to warn. The plaintiff sought to employ the state's "risk-utility approach" to determine whether a product is unreasonably dangerous as designed. *Id.* at 2473. Under the state's approach, a pharmaceutical manufacturer would be required to strengthen the warning on the generic drug at issue in the case. *Id.* at 2475. However, federal law prevents generic drug manufacturers from changing their labels. *Id.* at 2476. "Because it is impossible for Mutual and other similarly situated manufacturers to comply with both state and federal law, New Hampshire's warning-based design-defect cause of action is pre-empted with respect to FDA-approved drugs sold in interstate commerce." *Id.* at 2477 Importantly, the court found no relevance in the fact that the state law was of common law origin, instead of a statute: "In violating a common-law duty, as surely as by violating a statutory duty, a party contravenes the law." *Id.* at 2479. Because the state law duty to warn was preempted, the generic drug manufacturer had no need to alter its warnings to comply with it.

Similarly, some courts explain that a state rule that is preempted is no longer "good law." For example, the Second Circuit explained that federal copyright legislation preempted some state court decisions that relied upon state contract principles in conflict with the legislation, and, as such, those state

contract principles could no longer be considered "good law" on which parties could rely. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997) ("[M]ost of the broadcast cases relied upon by the NBA are simply not good law. Those cases were decided at a time when simultaneously-recorded broadcasts were not protected under the Copyright Act and when the state law claims they fashioned were not subject to federal preemption.").

Preempted state rules may also be described as "abrogated." In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), this Court stated that "we have not hesitated to abrogate state law where satisfied that its enforcement would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 209-10 (internal quotation marks omitted). Abrogate means "To abolish (a law or custom) by formal or authoritative action; to annul or repeal." Black's Law Dictionary (10th ed. 2014); *Northeast Sav., F.A. v. Director, Office of Thrift Supervision*, 770 F. Supp. 19, 23 n.3 (D.C. D.C. 1991) (abrogate means "to repeal, abolish, annul, cancel"); *State v. Hobson*, 218 Wis. 2d 350, 353 n.1 (1998) (same). This Court also used the word "abrogation" in the preemption context in *Farmers Educational and Coop. Union of America, N.D. Div. v. WDAY, Inc.*, 360 U.S. 525, 535 (1959): "[C]auses of action for libel are widely recognized throughout the states. But we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (Citations omitted.). The Ninth Circuit has done so as well, in the context of

federal bankruptcy law. For example, in *In re Schwartz-Tallard*, 765 F.3d 1096, 1102 n.5 (9th Cir. 2014), *reh'g en banc granted*, 774 F.3d 959 (2014), the Ninth Circuit heard an appeal from a Bankruptcy Appellate Panel, and noted that the BAP had relied on a case (*In re Walsh*, 219 B.R. 873 (9th Cir. B.A.P 1998)) that was rejected in a later case (*Sternberg v. Johnson*, 595 F.3d 937 (9th Cir. 2010)), and that such reliance on the earlier case was "improper." The Circuit panel specifically disclaimed any reliance on the "partially abrogated *Walsh* decision." *See also In re Farmers Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986) ("Congress may, within its constitutional limitations, abrogate state law entitlements in bankruptcy pursuant to its Bankruptcy Clause power, U.S. Const. art. I, § 8, cl. 4.").

Most recently, this Court used the word "invalidate" to describe the effect of preemption on a state law. *Oneok, Inc. v. Learjet, Inc.*, 2015 WL 1780926, *4 (U.S. Supreme Ct. Apr. 21, 2015) ("Congress may consequently pre-empt, *i.e.*, invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where, as here, a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action.") (citation omitted). A statute that is invalid, for whatever reason, could not be relied upon by either parties to litigation or by a court. *See Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006-07 (9th Cir. 1972) (reliance on an invalid state statute is not a defense to a Title VII suit); *King v. Hoke*, 825 F.2d 720, 724 (2d Cir. 1987) (sentencing judge's reliance on repealed sentencing statute is an error of law requiring reversal for resentencing); *Clay v. Permanente Medical Group, Inc.*,

540 F. Supp. 2d 1101, 1109-10 (N.D. Cal. 2007) (arguments fail that rely on older, non-current versions of a statute). This rule extends to the common law. *U.S. v. Sparks*, 711 F.3d 58, 64 n.3 (1st Cir.), *cert. denied*, 134 S. Ct. 204 (2013) (Reliance on a clear and well-defined judicial rule that is later abrogated is analogous to reliance on a subsequently invalidated statute.); *U.S. v. Tejada*, 631 F.3d 614, 619 (2d Cir. 2011) (Court rejected criminal defendant's challenge to his sentence in reliance on Circuit cases that were "abrogated by the Supreme Court's decision in *Abbott v. United States*, 562 U.S. 8 (2010)," because the abrogated cases were of no legal effect.).

2. Other Preempted Common Law Rules and Statutes Are Considered Nullified, Even by California Courts

In *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), this Court previously considered the relationship between federal preemption and California's common law. The case involved a federal regulation that granted federal savings and loan associations an option to include a due-on-sale clause in loan instruments. *Id.* at 144. When the defendant federal savings and loan association exercised its option to include the clause, three borrowers sued, claiming that the due-on-sale clause was unenforceable under a California common law rule announced in *Wellenkamp v. Bank of America*, 21 Cal. 3d 943 (1978), which held that a due-on-sale clause violates the state's prohibition of unreasonable restrains on alienation. The California Court of Appeal in *de la Cuesta* described this rule as "a substantive rule of California property and mortgage law," not

specifically intended to regulate federal savings and loan associations. *de la Cuesta*, 458 U.S. at 150 (citing *De La Cuesta v. Fidelity Sav. & Loan Ass'n*, 121 Cal. App. 3d 328, 339 (1981)). This Court analyzed the issue as a matter of "conflict" or "obstacle" preemption, as the statute lacked an express provision preempting state law. *Id.* at 153. The fact that a conflict existed was, as in this case, indisputable; the question was how that conflict affected continued application of the state rule.

> The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances." Although compliance with both [the federal regulation] and the [state common law] rule may not be "a physical impossibility," the California courts have forbidden a federal savings and loan to enforce a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by the Board.

Id. at 155. (footnote and citations omitted). Therefore, because the state rule limited an "option the Board considers essential to the economic soundness of the thrift industry," the state rule acted as an "obstacle" to the federal regulation and was preempted. *Id.* at 156. As a result, the loan instruments *could* include a due-

on-sale clause, regardless of contrary California common law and policy. *See also Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 39 (2010) ("[S]tate law is null and void if it conflicts with federal law.").

Outside the context of arbitration, California courts acknowledge the invalidating effect of a preemption holding. For example, in *Yarick v. PacifiCare of California*, 179 Cal. App. 4th 1158, 1162 (2009), the California Court of Appeal considered the preemptive effect of the Federal 2003 Medicare Prescription Drug, Improvement and Modernization Act, 42 U.S.C. § 1395w-26(b)(3) (also known as Medicare Advantage), on the plaintiff's state common law claims for negligence, elder abuse, and wrongful death. The plaintiff (decedent's administrator), argued that the financial incentive structure of the Medicare Advantage (MA) statute led the healthcare facilities that cared for the decedent to fail in their duties to exercise due diligence to ensure adequate care, and to establish an ongoing quality assurance program to ensure that healthcare benefits would not be delayed or denied to patients. *Id.* at 1164. The court considered PacifiCare's claims of both express and implied preemption. Some of Yarick's claims were premised on the state statutory standards for HMO organizations, *id.* at 1166, and these were held to be expressly preempted by the federal statute, that is, "superceded," with the result that those "sections cannot supply the standard of care for duties upon the respondent." *Id.* at 1167. "Obstacle" preemption eliminated the rest of Yarick's claims that were based on common law tort duties, rather than alleged violations of state statutes: "If state common law judgments were permitted to impose damages on the basis of these federally approved contracts and quality

assurance programs, the federal authorities would lose control of the regulatory authority that is at the very core of Medicare generally and the MA program specifically." *Id.* at 1167-68. Thus, the state laws were nullified and ineffective for establishing any standard of care with which the defendant had to comply.

In *Akopyan v. Wells Fargo Home Mortgage, Inc.*, 215 Cal. App. 4th 120, 129 (2013), *rev. denied* (Jun. 26, 2013), California residents sought to invoke state contract law and the state's Unfair Competition Law to bring a class action lawsuit against federally regulated loan servicing entities (a national bank and a "thrift institution") for their imposition of certain late fees. The court had to determine whether the plaintiffs' claims were preempted by the Federal National Bank Act (NBA) and Home Owners Loan Act (HOLA). First, the California court determined that federal law intended to occupy the field of lending regulation. *Id.* at 143. The plaintiffs argued, however, that their claims against the thrift were based on generally applicable contract law that should prevail because contract law is preempted from exemption where it only incidentally affects lending operations or is otherwise consistent with the Federal HOLA regulations. *Id.* at 143-44. The court rejected this argument:

> Appellants do not allege a routine breach of contract claim that purports to enforce their basic contract rights under the express terms of the loan agreements. Instead, the effect of implying a state substantive standard on late fees into the loans serviced by Aurora is to limit its ability to service the loans according to their express terms and to

> require that it service them in accordance with the specific state statute that applies to the loans. If this case is any indication, such a claim exposes the federal thrift to the additional expense of litigating which state statutes apply to particular loans, as well as to liability under a variety of state laws specifically regulating loan-related fees. Its effect is thus not to enforce a contractual obligation, but "to open the door to state regulation" of federal thrifts. In its final rule, the [Office of Thrift Supervision] expressly warned against the use of the savings clause to such an end.

Id. at 147. The plaintiffs' claims as to the bank were preempted by the NBA, even though national banks are "subject to state laws of general application" because that rule applies only to the extent that such laws "do not conflict with the letter or the general purposes of the NBA." *Id.* at 156 (citations omitted). The court explained that the breach of contract claim was not a run-of-the-mill application of contract principles because California had multiple late fee statutes, thus exposing Wells Fargo to the "expense and uncertainty of litigating, in the first instance, what statute applies to the loan it services." The California labyrinth of statutes also creates "diverse payment application schemes despite the uniform payment application terms of the mortgages it services." *Id.* at 158. The court held this "inconsistent with the purpose of the NBA to prevent the states from imposing 'diverse and duplicative limitations and restrictions' on its power to engage in the business of banking." *Id.* As such, the preempted California contract law principles were ineffective, that is, they

could not govern the actions of the bank and thrift. *See also Sanchez v. Lindsey Morden Claims Services, Inc.*, 72 Cal. App. 4th 249, 256 (1999), *rev. denied* (Jul. 28, 1999) (an abrogated common law duty is no duty at all).

B. California's *Discover Bank* Rule, Invalidating Class-Action Waivers as "Unconscionable," Can Have No Effect in the Construction of Any Arbitration Contract

The *Concepcion* opinion concludes: "Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' California's *Discover Bank* rule is preempted by the FAA." 131 S. Ct. at 1753 (citation omitted). As shown above, common law rules and state statutes are treated identically for purposes of federal preemption analysis. The identical treatment is particularly appropriate for the *Discover Bank* rule, which was written so broadly "that it almost reads like a legislative decree." Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435, 544 (2011). As a tool for analyzing arbitration contracts, the *Discover Bank* rule is a nonentity that the court below never should have invoked.

The Ninth Circuit's reaction to *Concepcion* demonstrates how a court assesses the practical matter of dealing with preempted laws or abrogated cases. For example, in *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937 (9th Cir. 2013), the court of appeals overruled circuit precedent applying the California Supreme Court's anti-arbitration *Broughton-Cruz*

doctrine[3] because the doctrine was preempted by the FAA. In so holding, the Ninth Circuit stated that it was overruling its prior precedent because it "is clearly irreconcilable with subsequent United States Supreme Court decisions concerning the FAA," such as *Concepcion*, *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and others. *Id.* at 934-37.[4] As such, the plaintiffs could not rely on the *Broughton-Cruz* doctrine as any type of authority supporting their claims.

The California courts appear to understand the nullifying effect of a preemption ruling in some circumstances. For example, in *California ARCO Distributors, Inc. v. Atlantic Richfield Co.*, 158 Cal. App. 3d 349, 363 (1984), the appellate court held that a state statute was preempted by a federal law. State courts were therefore forbidden to issue injunctions based on that preempted statute. *Id.* at 363-64. *See also Welton v. City of Los Angeles*, 18 Cal. 3d 497, 507 (1976) (First Amendment case noting that "[a]n

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[3] The doctrine holds arbitration provisions are unenforceable as against public policy if they require arbitration of injunctive relief claims brought for the public's benefit. *Broughton v. Cigna Healthplans of Calif.*, 21 Cal. 4th 1066, 1083-84 (1999); *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal. 4th 303, 318-19 (2003). The California Supreme Court granted review in *McGill v. CitiBank, N.A.*, 345 P.3d 61 (Cal. 2015), on April 1, 2015, to answer the question of whether the *Broughton-Cruz* doctrine survives *Concepcion*.

[4] Overruling a court's own prior cases is appropriate when a Supreme Court decision "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *U.S. v. Bryant*, 769 F.3d 671, 678 (9th Cir. 2014).

injunction based on an unconstitutional [law] exceeds the issuing court's jurisdiction.")).

The fact that the Federal Arbitration Act preempts the *Discover Bank* rule, limiting the scope of state contract law, is not unique. Many federal statutes affect state contract law, rendering their principles and remedies ineffective when they obstruct or otherwise conflict with federal law. For example, federal common and statutory law preempts state principles of contract law for purposes of the interpretation of policies issued pursuant to the National Flood Insurance Act of 1968. *Linder & Associates, Inc. v. Aetna Cas. & Sur. Co.*, 166 F.3d 547, 550 (3d Cir. 1999). Similarly, federal common law preempts state contract law for purposes of collective bargaining interpretation and enforcement. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

California is not the only state to have common law rules affecting arbitration agreements preempted by the Federal Arbitration Act. For example, New York had required that parties would not be bound to an arbitration contract "in the absence of an express, unequivocal agreement to that effect." *Matter of Marlene Indus. Corp. (Carnac Textiles)*, 45 N.Y.2d 327, 333 (1978). The Second Circuit held that this rule, because it applied only to arbitration contracts, was preempted. *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993). Subsequent courts interpreting arbitration agreements under New York law disregarded the *Marlene Industries* rule, as it was nullified and had no legal effect. *See, e.g., Huntington Int'l Corp. v. Armstrong World Indus. Inc.*, 981 F.

Supp. 134, 138 (E.D. N.Y. 1997) (applying New York law other than the anti-arbitration *Marlene Industries* rule); *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 100 (2d Cir. 2002) (disregarding effect of *Marlene Industries* when interpreting an arbitration contract).

Pennsylvania unconscionability law, like *Discover Bank*, also served to invalidate otherwise valid arbitration agreements. *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 883-84 (Pa. Super. Ct. 2006) (class action waivers are substantively unconscionable where "class action litigation is the only effective remedy" such as when "the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every plaintiff a meaningful remedy"). *Thibodeau* is now considered preempted by *Concepcion*. In *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2012), the Third Circuit explained that it would apply the state law only "to the extent that such law is not displaced" by the Federal Arbitration Act, *id.* at 230, specifically, *Concepcion*. *Id.* at 233 ("The Pennsylvania law is not substantively different from the California law, which is unquestionably preempted by the FAA."). Therefore, although *Thibodeau* would have invalidated the arbitration agreement because it contained a class action waiver, the *Quilloin* court did not find it unconscionable and held that the motion to compel arbitration should have been granted. *Id.* at 235.

Although *Discover Bank* remains in the law books, and may be authority for propositions unrelated to the interpretation of contracts governed by the Federal Arbitration Act, the aspects of its holding preempted by federal law are impotent with regard to the

unconscionability rule invalidated in *Concepcion*. *See First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 902 (5th Cir. 1995) ("Because the Texas homestead laws had not been repealed, they were in effect on the date of the Amendment, although they were arguably impotent in the context of federal bank regulation" which preempted the state laws prior to the federal statute's amendment.) (emphasis omitted).

II

CALIFORNIA COURTS MUST NOT ISOLATE THE STATE'S RESIDENTS FROM THE BENEFITS THEY SEEK TO OBTAIN FROM THE FEDERAL ARBITRATION ACT

The decision below continues a collision course upon which California courts have embarked with this Court's decisions regarding FAA preemption. Affirming the decision below would show state courts how to make "end runs" around the FAA and *Concepcion* via applicable state common law. Certainly, California courts have demonstrated marked persistence in light of this Court's decisions such that this Court may anticipate continued recalcitrance.

Since 1984, this Court has been reversing California court decisions that are based on distrust and disapproval of arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 5, 7 (1984) (reversing the California Supreme Court's holding that the state Franchise Investment Law required judicial resolution rather than arbitral resolution because "[p]lainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under

which they agreed to submit all contract disputes to final, binding arbitration"); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (reversing California Court of Appeal decision by holding that the FAA preempts a state labor law authorizing wage collection actions regardless of an agreement to arbitrate: "[U]nder the Supremacy Clause, the state statute must give way."); *Preston*, 552 U.S. at 359 (reversing California Court of Appeal and holding that the FAA's protection of an arbitration agreement vesting jurisdiction over all disputes in an arbitral tribunal supersedes state laws lodging dispute resolution jurisdiction in a different judicial or administrative forum); *Concepcion*, 131 S. Ct. at 1753 (reversing Ninth Circuit application of California's *Discover Bank* rule because "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons"); *see also Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011) (vacating and remanding California Supreme Court decision in *Sonic I*, which categorically forbade waiver of a Berman wage hearing prior to arbitration, for reconsideration in light of *Concepcion*); *CarMax Auto Superstores California, LLC v. Fowler*, 134 S. Ct. 1277 (2014) (vacating and remanding California Court of Appeal decision invalidating an arbitration contract on the "vindication of rights" theory, for reconsideration in light of *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

And as demonstrated by this case, each time this Court upholds an arbitration contract because the federal law requires it, California courts find new ways to express their unrelieved hostility to arbitration. *See, e.g., Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 1095 (2003) (Brown, J., concurring and dissenting) ("[T]his court appears to be 'chip[ping] away at' United

States Supreme Court precedents broadly construing the scope of the FAA 'by indirection,' despite the high court's admonition against doing so.") (citation omitted); *Gentry v. Superior Court*, 42 Cal. 4th 443, 473 (2007) (Baxter, J., dissenting) (noting the California Supreme Court's "continuing effort to limit and restrict the terms of private arbitration agreements, which enjoy special protection under both state and federal law"); *see also James v. Conceptus, Inc.*, 851 F. Supp. 2d 1020, 1036-37 (S.D. Tex. 2012) (applying California law; noting that some California courts, even post-*Concepcion*, continue to find arbitration forum-selection clauses unenforceable as unconscionable, while applying a far less stringent analysis to forum-selection clauses applicable to litigation).

With their continuing hostility to arbitration agreements, California state courts deprive the ability of millions of Californians to take advantage of the benefits of arbitration.

III

CALIFORNIA'S INTRANSIGENCE INFECTS OTHER STATES

Magnifying the problems posed by these challenges to the federal substantive law of arbitration, freedom of contract, and the FAA is the fact that California's hostility to arbitration has considerable potential to influence other states. As a center of economic trade, contracts across the country often provide that California law controls. *See, e.g., Triad Sys. Fin. Corp. v. Stewart's Auto Supply, Inc.*, 47 F. Supp. 2d 1332, 1334 (N.D. Ala. 1999) (Alabama residents bound by contract that made California law

controlling); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004) (upholding reinsurance agreement that designated California law as controlling); *Naegele v. Albers*, 940 F. Supp. 2d 1, 8-9 (D.D.C. 2013) (relying on California arbitration law and staying federal proceedings); *Phillips Petroleum Co. v. Arco Alaska, Inc.*, No. 7177, 1986 WL 7612, at *6-7 (Del. Ch. July 9, 1986) (parties to oil and gas leases in Prudhoe Bay, Alaska, agreed that California law controlled their arbitration contract).

In addition to choice-of-law language in the contract itself, some courts find California decisions interpreting arbitration contracts persuasive authority when interpreting challenges to arbitration contracts under their own state laws. *See Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2014 WL 4459129, at *10 (N.Y. App. Div. Sept. 11, 2014) (finding persuasive an unpublished California Court of Appeal decision that invalidated an arbitration contract as incompatible with a state regulatory and statutory scheme related to workers' compensation); *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 (1st Cir. 2006) (adopting California approach to unconscionability that prohibited a ban on classwide arbitration); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646 (2011) (relying, in part, on California case law to invalidate arbitration clause in nursing home contract), *judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012); *see also Episcopal Church in Micronesia v. Chung Kuo Ins. Co., Ltd.*, No. 84-0001, 1985 WL 56588, at *2 (D. Guam June 28, 1985) (Guam's Arbitration Act is patterned after California's statutes and California law on the subject is persuasive, although not binding.); *Discover Bank v. Shea*, 827 A.2d 358, 362 (N.J. Super. Ct. Law

Div. 2001) (noting similarity of New Jersey and California law with respect to arbitration), *app. dismissed*, 827 A.2d 292 (N.J. Super. App. Div. 2003).

Indeed, California's repeated intransigence may serve as inspiration to other state courts that wish to "resurrect" state common law displaced by the FAA, especially other state courts that have made no secret of their disapproval of this Court's FAA jurisprudence. The Massachusetts Supreme Judicial Court's treatment of the consumer arbitration contract in the thrice-considered *Feeney v. Dell Inc.* case provides a salient example. In that case, consumers sued in a purported class action challenging Dell's allegedly improper collection of sales tax on optional computer service contracts for which (according to plaintiffs) no sales tax was actually due. The service contracts included an individual arbitration clause that waived the ability to pursue class relief. In *Feeney v. Dell Inc.*, 454 Mass. 192, 209-10 (2009), the court declined to enforce the class action waiver as a violation of Massachusetts' public policy in favor of class actions for "consumer protection" claims. After this Court decided *Concepcion*, Dell sought and received a rehearing, and the Massachusetts court issued a decision announcing a new reason for invalidating the arbitration contract, holding that *Concepcion* barred a court "from invalidating an arbitration agreement that includes a class action waiver where a plaintiff can demonstrate that he or she effectively cannot pursue a claim against [a] defendant in individual arbitration according to the terms of the agreement, thus rendering his or her claim nonremediable." *Feeney v. Dell Inc.*, 465 Mass. 470, 472 (2013).

Eight days later, this Court rejected that exact rationale in *Italian Colors*, 133 S. Ct. at 2312, n.5 ("[T]he FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."). Issuing its third decision in the case, the Massachusetts court grudgingly acknowledged the demise of *Feeney II*, holding that

> as long as an arbitration agreement does not expressly "forbid[ ] the assertion of certain [Federal] statutory rights" or "perhaps" require the payment of "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable," a plaintiff was not deprived of his or her *right to pursue* statutory remedies.

Feeney v. Dell Inc., 466 Mass. 1001, 1002-03 (2013) (citation omitted). With a parting shot at this Court's holdings, the state court bitterly wrote: "Although we regard as untenable the Supreme Court's view we are bound to accept that view as a controlling statement of Federal law." *Id.* at 1003. Even so, the court remanded the case to give the plaintiffs yet another chance to come up with "alternative grounds" to invalidate the contract. *Id.*

If this Court permits the California end-run to stand, Massachusetts and other arbitration-hostile jurisdictions will look to the decision below as a blueprint to avoid this reach of the Federal Arbitration Act and the federal substantive law of arbitration's commitment to freedom of contract.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

DATED: June, 2015.

Respectfully submitted,

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No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the
California Court of Appeal

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. This case presents an issue of contract construction that does not genuinely implicate the Supremacy Clause. 4

II. The state court's construction of the contract is not foreclosed by federal preemption principles. 7

A. As a matter of common usage, a preempted state law is law of the state. 7

B. The Supremacy Clause and this Court's preemption jurisprudence presuppose that state law may conflict with federal law, and supply a rule of decision for resolving such conflicts. 10

C. The FAA does not bar parties from choosing to apply otherwise-preempted state laws. 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases:

Arizona v. Inter Tribal Council of Ariz., Inc.,
133 S. Ct. 2247 (2013) 9

Armstrong v. Exceptional Child Care Ctr.,
135 S. Ct. 1378 (2015) 8, 10

Arthur Andersen LLP v. Carlisle,
556 U.S. 624 (2009) 4

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 5, 9

City & County of San Francisco v. Sheehan,
135 S. Ct. 1765 (2015) 16

Crawford v. Weather Shield Mfg., Inc.,
187 P.3d 424 (Cal. 2008) 8

Dan's City Used Cars, Inc. v. Pelkey,
133 S. Ct. 1769 (2013) 9

Discover Bank v. Super. Ct.,
113 P.3d 1100 (Cal. 2005) 12

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 4

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 10

Haywood v. Drown,
556 U.S. 729 (2009) 11

Hillman v. Maretta,
133 S. Ct. 1943 (2013) 9

Howlett v. Rose,
496 U.S. 356 (1990) 11

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 6, 14, 15

Mondou v. N.Y., N.H. & H. R.R.,
223 U.S. 1 (1912) 9

Mut. Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 9

Northwest, Inc. v. Ginsburg,
134 S. Ct. 1422 (2014) 8

Oneok, Inc. v. Learjet, Inc.,
135 S. Ct. 1591 (2015) 8

Perry v. Thomas,
482 U.S. 483 (1987) 5, 6, 7, 12

Shelby County v. Holder,
133 S. Ct. 2612 (2013) 8, 9

Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 4

Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989) 4, 6, 11, 12, 13, 14, 15

Wos v. E.M.A. ex rel. Johnson,
133 S. Ct. 1391 (2013) 9

Constitutional Provisions, Statutes, and Rules:

U.S. Const., art VI, cl. 2 ..... 8, 10, 11

Federal Arbitration Act

9 U.S.C. § 1 12

9 U.S.C. § 2 12

Cal. Civ. Code § 1644 8

Cal. Civ. Code § 1751 12

Cal. Lab. Code § 229 ..... 6, 7, 12

Other:

P. Butler & C. Drahozal, *Contract and Choice*, 2013 B.Y.U.L. Rev. 1 ..... 5, 6

C. Drahozal, *Contracting Around Hall Street*, 14 Lewis & Clark L. Rev. 905 (2010) 5, 6

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has longstanding interests in promoting the proper use of class actions to secure the rights of large numbers of people who have suffered legal wrongs, as well as in curbing misuse of class actions. Public Citizen is also concerned with the effects of mandatory arbitration on the rights of consumers and workers, particularly to the extent that arbitration agreements may prevent the effective pursuit of class remedies. In addition, Public Citizen has addressed issues concerning federal preemption of state law in a variety of contexts not limited to arbitration.

As a result of these interests, Public Citizen's attorneys have participated, as counsel to parties or to Public Citizen and other amici curiae, in many cases involving class actions, arbitration, and preemption, both in this Court and the lower federal and state courts. These issues converge in this case, and Public Citizen accordingly submits this brief to address fundamental misconceptions about the nature of federal preemption, and in particular preemption under the Federal Arbitration Act (FAA), that animate the positions asserted by DIRECTV and its amici curiae.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Counsel for all parties have filed letters of consent to filing.

SUMMARY OF ARGUMENT

This case presents only a question about how to interpret a provision in a contract between the parties. Under that provision, the contract does not permit arbitration of any dispute between the parties if "the law of [the consumer's] state would find [the contract's] agreement to dispense with class arbitration procedures unenforceable." Does the contract refer to the state law that would apply in the absence of preemption by the FAA? Or does it mean the law of the state unless that law is preempted by the FAA? The state court's adoption of the former interpretation—which in this case bars arbitration because the law of California would not allow enforcement of the class-action ban—poses no genuine issue of federal preemption, as the state court's holding that arbitration may not proceed merely reflects the parties' agreement as reflected in the words of their contract.

DIRECTV and its amici strain to transform the contractual issue posed by the case into one of federal preemption by suggesting that, as a matter of constitutional law under the Supremacy Clause, the parties' contract cannot be construed to refer to a preempted state law. Indeed, they argue, it is meaningless to refer to a conflict-preempted law as the law of the state, because under the Supremacy Clause, state law in conflict with federal law does not exist, and the preemptive federal law is the law of the state.

Those arguments are wrong on three levels. First, the status of state law under the Supremacy Clause does not control the meaning of the words used by parties to a contract. Rather, under the applicable state-law principles of contract construction, those words must be given their ordinary meaning. And the

ordinary meaning of "law of a state"—indeed, the meaning used in the Supremacy Clause itself and in innumerable opinions of this court—is the state's own law, not federal law that may supplant it under principles of federal preemption.

Second, even as a matter of constitutional law, referring to a preempted state law as the law of the state is not meaningless. The Constitution incorporates the assumption that the laws of the states may at times be contrary to federal law, and it provides a rule of decision in the event of such conflict: Federal law applies. But that federal law renders a conflicting state law ineffective does not change the fact that the preempted law is a state law.

Third, the claim that state laws concerning arbitration that are subject to conflict preemption by the FAA do not exist is impossible to square with the limits on FAA preemption. The FAA does not preempt the field of arbitration regulation, and its application is not universal. States may have and enforce laws—even laws that resolve arbitration issues the opposite way from the FAA—regulating arbitrations that fall outside the FAA's scope. Furthermore, parties to arbitration agreements subject to the FAA may, as this Court has held, choose to apply state-law principles regarding arbitration that, but for the parties' choice to apply them, would conflict with the FAA. That option—exercised by the parties in this case—is incompatible with the proposition that a state law that may come into conflict with the FAA is not the law of the state.

ARGUMENT

I. This case presents an issue of contract construction that does not genuinely implicate the Supremacy Clause.

Properly viewed, this case presents no preemption issue, but only a question of contract construction: What does the contract in this case mean when it provides that there is no agreement to arbitrate if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable"? That question, like questions of contract construction generally, is fundamentally one of state law, even as to agreements concerning arbitration. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474–76 (1989). Nothing in the FAA displaces "background principles of state contract law regarding the scope of agreements" about whether to arbitrate. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

Principles of contract interpretation that reflect hostility to or discrimination against arbitration may, of course, be preempted by the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). But there is no serious argument that the principles applied by the state court here—giving effect to the natural meanings of words used in a contract, granting specific language priority over more general provisions, and construing language against the drafter of a form contract—reflect the kind of hostility toward arbitration that could require preemption by the FAA. The court did not "construe th[e] agreement in a manner different from that in which it otherwise con-

strues nonarbitration agreements under state law." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

Nonetheless, DIRECTV and its amici argue that the state court improperly gave effect to state laws that are preempted under this Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). That argument misconceives what the state court did when it held that the parties' contract did not provide for arbitration of this case. *Concepcion* held that state laws that refuse enforcement to arbitration agreements forbidding plaintiffs to pursue class actions are in conflict with the FAA and hence cannot apply of their own force in cases subject to the FAA. But the state court here did not hold that the preempted state-law principles applied of their own force: It gave effect to the *parties' agreement* not to arbitrate when the customer lives in a state under whose law a class-action ban *would* be unenforceable absent the FAA. In such a case, "it is the parties' agreement, and not [state] law, that prevents arbitration." C. Drahozal, *Contracting Around Hall Street*, 14 Lewis & Clark L. Rev. 905, 919 n.73 (2010). Hence "there is nothing for the FAA to preempt." *Id.*

For example, "under well-settled preemption principles, a state law that precludes arbitrators from resolving claims under a particular state statute (such as a franchisee protection statute) would be preempted. But the FAA certainly does not preclude the parties themselves from agreeing to exclude claims under the state franchisee protection statute from their arbitration agreement." P Butler & C. Drahozal, *Contract and Choice*, 2013 B.Y.U.L. Rev. 1, 26. And parties may express such an agreement using language that "incorporates by reference state arbitration law

to define its scope," and if they do so, courts should "enforce the agreement so construed." *Id.*

Moreover, should the parties express an agreement not to arbitrate, or to limit the scope of arbitration, by incorporating state-law provisions or principles by reference, the possibility that the state law in question might itself reflect hostility toward or discrimination against arbitration should have no bearing on the enforceability of the parties' agreement. C. Drahozal, *supra*, at 919 n.74. State laws that are hostile to arbitration may be unenforceable in cases involving agreements subject to the FAA, but no principle of law forbids the enforcement of *contracts* that reflect hostility toward or discrimination with respect to arbitration. "[T]the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). As far as the FAA is concerned, contracts may refrain from providing for arbitration of disputes—or "discriminate against arbitration"—on any basis the parties choose. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so, ... nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt*, 489 U.S. at 478.

Thus, this Court held in *Perry v. Thomas* that California Labor Code § 229, which prohibits enforcement of an agreement to arbitrate an action to collect unpaid wages, cannot be applied to bar arbitration under a contract governed by the FAA because the statute conflicts with the FAA's "clear federal policy" that agreements to arbitrate be "rigorously enforce[d]." 482 U.S. at 490–91. In contrast, the FAA

would not preempt enforcement of an agreement in which the parties themselves excepted actions to collect unpaid wages from an agreement to arbitrate. Indeed, the FAA's "clear federal policy" would demand that the parties' exception be "rigorously enforce[d]." *Id.* The outcome should be the same whether the parties set forth the exception by saying, "actions for unpaid wages are not subject to arbitration under this agreement," or by stating that "claims that would fall within the scope of California Labor Code § 229 are not subject to arbitration under this agreement."

II. The state court's construction of the contract is not foreclosed by federal preemption principles.

Although the decision below rests on the construction and enforcement of a contract, DIRECTV and its amici contend that preemption principles remain relevant. They argue, in essence, that a preempted state law is a nullity that ceases to exist—that is, that a preempted state law is not a state law. Rather, they argue, the preemptive federal law itself is the law of the state. Pet. Br. 19; WLF Br. 6–7, 14–19; PLF Br. 3-19. The argument is wrong as a matter of contract construction, preemption doctrine generally, and FAA preemption doctrine specifically.

A. As a matter of common usage, a preempted state law is law of the state.

The issue here is what the *contract* means by "law of your state," not what the metaphysical status of preempted state laws may be as a matter of Supremacy Clause jurisprudence. Under California law, as under the statutory and common law of the states generally, "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than ac-

cording to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." Cal. Civ. Code § 1644; *see, e.g.*, *Crawford v. Weather Shield Mfg., Inc.*, 187 P.3d 424, 430 (Cal. 2008). In ordinary usage, the "law of a state" refers to the state's own common or statutory law, not to federal laws that may preempt particular applications of the state's laws.

Indeed, the Supremacy Clause itself provides that the Constitution and the laws of the United States enacted thereunder are the supreme law of the land and bind judges in the states, "any Thing in the *Constitution or Laws of any State* to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2 (emphasis added). The Constitution itself thus refers to the conflicting state enactments that it preempts as the "Laws of [a] State." This Court's preemption decisions likewise regularly and consistently refer to state enactments or common-law principles that are subject to federal preemption as "state laws" or "laws of" particular states.[2]

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[2] Examples are too numerous to catalog. Some recent instances (with emphasis added in each citation) include: *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (observing that field preemption operates "irrespective of whether *state law* is consistent or inconsistent with 'federal standards,'" while conflict preemption exists where "compliance with *both state and federal law* is impossible" or where "*state law*" is an obstacle to federal policy); *Armstrong v. Exceptional Child Care Ctr.*, 135 S. Ct. 1378, 1384 (2015) (noting that "a court may not convict a criminal defendant of violating a *state law* that federal law prohibits"); *Northwest, Inc. v. Ginsburg*, 134 S. Ct. 1422, 1432 (2014) ("When the *law of a State* does not authorize parties to free themselves from the covenant, a breach of covenant claim is

(*Footnote continued*)

The notion that referring in a contract to preempted state law as the "law of a state" meaninglessly invokes something that "in legal contemplation does not exist," WLF Br. 16 (quoting *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 57 (1912)), founders on the fact that this Court's opinions and the Supremacy Clause employ exactly that usage.

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pre-empted ...."); *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) (pointing out that the framers of the Constitution rejected a proposal to allow a federal veto of state laws "in favor of allowing *state laws* to take effect, subject to later challenge under the Supremacy Clause"); *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473, 2476 (2013) (describing applicable "*duties under state law*" before holding state law preempted because "*state law requires*" actions that "federal law forbids"); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (holding that federal law "pre-empts *Arizona's state-law requirement*" that officials deny registration to voters using a federal registration form); *Hillman v. Maretta*, 133 S. Ct. 1943, 1952 (2013) (finding preemption of state law concerning disposition of federal employee insurance benefits because "*applicable state law* 'substitutes the widow' for the 'beneficiary Congress directed ...'"); *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) ("The FAAAA's preemption clause prohibits enforcement of *state laws* 'related to a price, route, or service of any motor carrier ... with respect to the transportation of property.'"); *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1398 (2013) (observing that preemption analysis requires analysis of "what *the state law* in fact *does*"); *Concepcion*, 131 S. Ct. at 1753 (holding that "California's *Discover Bank* rule" is preempted).

B. The Supremacy Clause and this Court's preemption jurisprudence presuppose that state law may conflict with federal law, and supply a rule of decision for resolving such conflicts.

The suggestion that it is meaningless to speak of a preempted state law is also contrary to a proper understanding of Supremacy Clause doctrine. The text of the Clause presupposes the possibility that federal law may conflict with the law of a state—that is, that there may be some "Thing" in a state's law that is "Contrary" to federal law. U.S. Const., art. VI, cl. 2. As relevant here, the Clause prescribes a particular consequence in the event of such a conflict: judges in a state must apply federal law rather than the contrary law of their own state. *Id.* As this Court recently put it, "[i]t is apparent that this Clause creates a rule of decision" for a particular type of conflict of laws—conflict between state and federal law. *Armstrong*, 135 S. Ct. at 1383. Thus, courts "must not *give effect* to state laws that conflict with federal laws." *Id.* (emphasis added; citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824)). As the Court put the matter in *Gibbons* itself, when a state's law is "contrary to the laws of Congress, made in pursuance of the constitution," then "the act of Congress ... is supreme; and the *law of the State*, though enacted in the exercise of powers not controverted, must yield to it." 22 U.S. (9 Wheat.) at 211 (emphasis added).

Preemption, then, does not rest on the fiction that conflicting state law does not exist. Rather, preemption rests on the principle that, in the event of a conflict, both the governments and people of the United States must follow, and courts must apply, federal law

rather than state law. As this Court has repeatedly stated, federal laws are "laws in the States," *see, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 367 (1990), and must be followed in preference to state laws to the extent of any conflict between the two.[3] State laws are *ineffective* insofar as they may conflict with federal law, because "a valid federal law is substantively superior to a state law," *Haywood*, 556 U.S. at 751 (Thomas, J., dissenting)—but that does not make it improper or meaningless to distinguish between state and federal law or to refer to a preempted state law as state law.

C. The FAA does not bar parties from choosing to apply otherwise-preempted state laws.

The proposition that preempted state law cannot be referred to as the "law of the state" is particularly hard to square with the limited scope of preemption under the FAA. As this Court has emphasized, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477. Federal law thus "has not completely displaced state regulation" of arbitration, and preempts state arbitration law only "to the extent that it actually conflicts with federal law." *Id.*

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[3] *Haywood v. Drown*, 556 U.S. 729, 734 (2009), is a unusual instance of the Court's referring to federal law as law "of" the states, but that usage does not appear to have been critical to the Court's holding, which was an application of longstanding case law providing that state courts must give effect to federal rights of action because, under the Supremacy Clause, federal law must be applied by "Judges in every State." U.S. Const., art. VI, cl. 2.

State law can "conflict" with the FAA, of course, only where the FAA applies. The FAA is limited by its terms to arbitration agreements in contracts involving transactions in interstate commerce, 9 U.S.C. § 2, and it excludes employment contracts involving seamen, railroad employees, and other transportation workers. 9 U.S.C. § 1. States are entirely free to regulate, limit, or even prohibit arbitration agreements that are not subject to the FAA in whatever way they wish (subject, of course, to constitutional constraints and the possibility of preemption by laws *other* than the FAA), regardless of whether their laws would conflict with the FAA if applied to contracts within the FAA's scope.

Thus, for example, California Labor Code § 229's prohibition of compelled arbitration of actions for unpaid wages, held preempted by the FAA in *Perry v. Thomas*, 483 U.S. 483, remains applicable to claims of transportation workers, as their employment contracts are not covered by the FAA. Likewise, the California Supreme Court's ruling in *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005), and California's statutory prohibition on waiver of the right to bring class actions under the Consumers Legal Remedies Act, Cal. Civ. Code § 1751, remain effective as to arbitration agreements outside the FAA's scope.

Moreover, as this Court emphasized in *Volt*, the fundamental policy of the FAA—that arbitration agreements be enforced "according to their terms," 489 U.S. at 476—places important limitations on the law's preemptive effect. As *Volt* illustrates, one consequence of that policy is that parties are free to choose to have their agreements concerning arbitration governed by state laws even when, absent that choice, the

FAA would require a result different from the state laws chosen by the parties. *See id.* at 479.

In *Volt*, a state court had construed the parties' arbitration agreement to call for the application of the California Arbitration Act rather than the FAA. The result was that arbitration was stayed under California law under circumstances where the party seeking arbitration claimed that the FAA would require an order staying litigation pending arbitration. *See id.* at 471–72. That is, *Volt* involved a situation where a party claimed that federal and state law required *opposite* results as to whether arbitration would occur, so that absent the parties' agreement to the application of state law, federal law (if applicable) would necessarily preempt application of state law. This Court noted that the parties did not dispute that the FAA applied to their agreement, which involved a transaction in interstate commerce, and the Court assumed that the party seeking to arbitrate was correct in asserting that, but for the parties' agreement to apply state law, the FAA would forbid staying the arbitration. *Id.* at 476–77. The Court held, however, that far from preempting the application of the conflicting state-law rule agreed to by the parties, the FAA allowed the state court to give effect to the parties' choice. *See id.* at 475–78.

Indeed, the Court explained that giving effect to the parties' agreement promoted the fundamental policy of the FAA:

> Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the

> Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, ... we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Id. at 479.

This Court's holding in *Volt* would make no sense if preemption principles actually dictated that a conflict-preempted state law could not be treated as the law of a state for any purpose, not even the construction of a contract referring to state law. If FAA preemption had that effect, the Court in *Volt* would have had to hold that the parties' choice of "California" law to govern their arbitration required application of the conflicting FAA rule because federal law, not conflict-preempted state law, was actually the law of California. *Volt*'s holding cannot be squared with the assertion that it is meaningless or ineffectual for a contract to refer to a state law whose application to particular circumstances would be preempted by federal law as the law of the state.

The Court's decision in *Mastrobuono* likewise lends no support to the arguments of DIRECTV and its amici. There, the Court assumed that the parties could, if they chose, adopt New York state law's prohibition on the award of punitive damages, even though the FAA would otherwise preempt a state's attempt to limit the matters that could be delegated to an arbitrator. *See* 514 U.S. at 57–58. The Court held, however, that the contract in question did not select New York law to govern the remedies available in arbitration. Rather, in light of the fact that the contract specifically selected NASD rules (which al-

lowed punitive damages) to govern its arbitration provision, the Court interpreted the broader, generic choice-of-law provision referencing New York law as a choice of substantive law rather than arbitration law. *See id.* at 58–64.

Here, the situation is reversed: Although the contract generically states that its section concerning arbitration is governed by the FAA, it specifically provides that whether the provision may be enforced to require arbitration as to any particular consumer depends on whether the contract's bar on class proceedings would be enforceable under the law of the consumer's state. The critical contract construction principles that the Court applied in *Mastrobuono*—giving effect to all provisions of the contract, harmonizing provisions by not applying a general provision to a subject addressed directly by a more specific provision, and construing an agreement against its drafter—point to exactly the opposite result in this case from that reached in *Mastrobuono*.

As the contrast between *Mastrobuono* and *Volt* illustrates, this case does not really turn on whether giving effect to a contract's choice of otherwise conflict-preempted state law is contrary to—or somehow rendered meaningless by—broad principles of preemption. The question presented is solely what the terms of this contract mean when they refer to the law of the state. Indeed, DIRECTV itself ultimately admits that the preemption principles cited by it, and discussed at greater length by its amici, are window-dressing when it acknowledges that "[c]ontracting parties can always choose, of course, to bind themselves by reference to state law that has been 'nullified' by federal law, just as they can choose to bind

themselves by reference to the rules of a board game." Pet. Br. 20. DIRECTV's concession on this point effectively admits that what it described in its petition for a writ of certiorari as the "first" reason the case presented an issue of federal law meriting review—that under the Supremacy Clause, "there is no such thing as state law immune from the preemptive force of federal law," Pet. 10—is a red herring. Stripped of its Supremacy Clause veneer, DIRECTV's argument s just that the state court "erred" in "interpret[ing]" the idiosyncratic agreement in this case. Pet. Br. 11.

As respondents' brief points out, that argument poses the kind of state-law issue as to which this Court generally lacks authority to second-guess a state court, and DIRECTV has in any event failed to demonstrate that the state court here erred in resolving it. In light of DIRECTV's bait-and-switch substitution of a garden-variety contract construction claim for the constitutional issues touted in its petition, this Court may wish to accept respondents' suggestion that it dismiss the writ as improvidently granted. *Cf. City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772–74 (2015); *id.* at 1778–80 (Scalia, J., concurring in part and dissenting in part). Alternatively, this Court may see fit to decide the case either by construing the contract itself or (more properly) adopting the state court's construction as authoritative in light of the state-law nature of the issue of contract construction. In no event, however, should the Court's disposition turn on the notion that the state court's resolution of this case is somehow contrary to fundamental Supremacy Clause principles.

CONCLUSION

The Court should affirm the decision of the California Court of Appeal.

Respectfully submitted,

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July 2015

No. 14-462

In the Supreme Court Of the United States

DIRECTV, INC., PETITIONER

v.

AMY IMBURGIA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE MICHAEL VACHON IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

I. STATEMENT OF INTEREST 1

II. SUMMARY OF ARGUMENT 1

III. ARGUMENT 4

A. *Concepcion* Did Not Rule That The FAA Categorically Preempts State Anti-Class-Waiver Laws In All Contexts 4

1. The *Discover Bank* Rule Was Preempted Based On Obstacle Preemption 4

2. Obstacle Preemption Displaces State Laws Only To The Extent That They Interfere With Congress's Objectives 4

3. The *Discover Bank* Rule Interfered With The Goal Of Granting Parties The Freedom To Select The Rules Applicable To Their Arbitrations 5

B. Enforcing Agreed-Upon Terms Does Not Interfere With The Achievement Of Congress's Objectives 7

C. The Agreement Must Be Interpreted To Mean What A Reasonable Consumer Would Think That It Means 8

IV. CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

AT&T Mobility v. Concepcion,
131 S. Ct. 1740 (2011) ..... passim

Ballay v. Legg Mason Wood Walker, Inc.,
878 F.2d 729 (3d Cir. 1989) 10, 11, 12

Bank of the West v. Superior Court,
2 Cal.4th 1254 (1992) 11, 12

Dalton v. Little Rock Family Planning Servs.,
516 U.S. 474 (1996) 4

Discover Bank v. Superior Court,
36 Cal.4th 148 (2005) ..... passim

Goldberg v. Bear, Stearns & Co.,
912 F.2d 1418 (11th Cir. 1990) 10, 11, 12

Gooding v. Shearson Lehman Bros., Inc.,
878 F.2d 281 (9th Cir. 1989) 10, 11, 12

Imburgia v. DIRECTV, Inc.,
225 Cal.App.4th 338 (2014) 9

Mastrobuono v. Shearson Lehman Hutton,
514 U.S. 52 (1995) 9

Perry v. Thomas,
482 U.S. 483 (1987) 11

TABLE OF AUTHORITIES

Page

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 9

Volt Info. Scis. v. Bd. of Trs.,
489 U.S. 468 (1989) 8, 9, 11

Wilko v. Swan,
346 U.S. 427 (1953) 9

STATUTES

15 U.S.C. § 77a *et seq.* 9

9 U.S.C. § 1 *et seq.* 2

Cal. Civ. Code § 1649 ..... 11, 12

OTHER AUTHORITIES

OXFORD UNIV. PRESS, NEW OXFORD AMERICAN DICTIONARY 1675 (Angus Stevenson & Christine A. Lindberg eds., 3rd ed. 2010) 9

I. STATEMENT OF INTEREST

Michael Vachon (hereafter "Amicus"), as amicus curiae, respectfully submits this brief in support of Respondents to bring to the attention of the Court matters not addressed by the parties.[1]

Amicus has an interest in this matter because he is attorney of record for the named plaintiff in a putative class-action lawsuit, the viability of which will likely be determined by the outcome of this case. Specifically, Amicus is attorney for the proposed class representative in Kaghazchi v. Mission Imports, No. 30-2012-00564149 (Cal. Super. filed Apr. 24, 2012). Like this case, the arbitration clause at issue in the Kaghazchi case contains a "poison-pill" clause which is governed by California law and which requires that the entire arbitration section be stricken out of the contract in cases in which the class-action waiver is unenforceable. Since the Court's opinion in this case will likely affect whether the Kaghazchi case is permitted to proceed as a class action, Amicus's duty to Kaghazchi and the putative class members necessitates that he attempt to bring to the Court's attention relevant arguments that the parties herein have not asserted.

II. SUMMARY OF ARGUMENT

Petitioner's argument is premised on the assumption that *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) ruled that the Federal Arbitration

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than Amicus made a monetary contribution to fund the preparation of this brief. All parties have submitted letters to the Clerk granting blanket consent to the filing of amicus curiae briefs in support of either or neither party. *See* S. Ct. R. 37.3(a).

Act (9 U.S.C. § 1 *et seq.*) ("FAA") categorically preempts state laws prohibiting the waiver of class action rights, and therefore that such state laws are a "legal nullity." However, *Concepcion* actually ruled that the FAA preempted California's *Discover Bank* rule[2] because it amounted to an obstacle to the achievement of Congress's objectives. This Court has previously explained that the Constitution displaces state laws only to the extent that they conflict with federal law, and therefore a finding of obstacle preemption does not mean that a state law is a "legal nullity" in all possible contexts; rather, a state law preempted in one case based on obstacle preemption remains enforceable in other cases in which it does not actually interfere with the achievement of Congress's objectives.

Accordingly, one cannot simply presume that *Concepcion* categorically preempts all state laws prohibiting the waiver of class-action rights (hereafter "state anti-class-waiver laws") in all possible contexts. To determine whether *Concepcion* requires a finding of preemption in this instance one must first identify the congressional objective that the *Discover Bank* rule interfered with in *Concepcion*, and then analyze whether – given the facts of this case – the state anti-class-waiver laws at issue here are an obstacle to the achievement of that objective.

In *Concepcion*, this Court explained that Congress intended the FAA to grant parties the freedom to choose the rules, procedures, and conditions applicable to their arbitrations in order to

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[2] "*Discover Bank* rule" refers to the rule announced in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005).

facilitate the creation of streamlined proceedings tailored to parties' particular needs. The *Discover Bank* rule was an obstacle to this objective because, notwithstanding the parties' agreement to the contrary, it conditioned the enforceability of the parties' arbitration agreement on the availability of class-wide arbitration, which lacks the informality that arbitration was intended to provide and imposes prohibitive risks of error on defendants. In reaching this conclusion, the Court took care to point out that if parties actually agree to class-wide arbitration, then the FAA will nonetheless require enforcement of such agreements because the FAA's primary mandate is the enforcement of privately negotiated agreements. In making this latter point, the Court acknowledged the obvious limits of the *Concepcion* obstacle preemption finding: *terms that parties have agreed to include in their arbitration agreements cannot be an obstacle to the objective of allowing parties to determine, by agreement, which terms their arbitration agreements should include.* Enforcing the terms of privately negotiated arbitration agreements, whatever those terms are, is the embodiment of Congress's goals in enacting the FAA, and not an obstacle to them.

In this case, the parties expressly agreed that: (1) their arbitration agreement should contain a "poison-pill" clause; (2) the poison-pill clause should be triggered when the class-action waiver is unenforceable; and (3) California's laws determine whether or not the class-action waiver is enforceable. Because the parties agreed to all of these terms, enforcing each of them is consistent with the FAA's objectives. Accordingly, obstacle preemption does not arise in this case, and the decision of the court below should be affirmed.

III. ARGUMENT

A. *Concepcion* Did Not Rule That The FAA Categorically Preempts State Anti-Class-Waiver Laws In All Contexts

1. The *Discover Bank* Rule Was Preempted Based On Obstacle Preemption

In *Concepcion*, this Court ruled that the FAA preempted the *Discover Bank* rule because it was an obstacle to the achievement of Congress's objectives in enacting the FAA. *Concepcion*, 131 S. Ct. at 1753 ("Because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' [citation] California's *Discover Bank* rule is preempted by the FAA.").

2. Obstacle Preemption Displaces State Laws Only To The Extent That They Interfere With Congress's Objectives

Federal statutes preempt state laws only to the extent that they are actually in conflict. *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996). Accordingly, a judicial finding of obstacle preemption does not necessarily amount to a finding that the preempted state law is a "legal nullity" for all purposes and in all contexts; rather, state laws that are an obstacle in one case remain enforceable in other cases in which they do not actually interfere with the achievement of congressional objectives. *Id.* (affirming finding of obstacle preemption, but reversing injunction against enforcement of the state law because it remains enforceable in cases in which it does not interfere with congressional objectives). Thus, the finding of obstacle preemption in *Concepcion* does not equate to a ruling that the FAA categorically

preempts all state anti-class-waiver laws in all possible contexts.

To determine whether *Concepcion* requires a finding of preemption in this case it is necessary to identify the congressional objective that the *Discover Bank* rule interfered with in *Concepcion*, and then analyze whether, under the circumstances present here, California's anti-class-waiver laws are an obstacle to the achievement of that objective.

3. The *Discover Bank* Rule Interfered With The Goal Of Granting Parties The Freedom To Select The Rules Applicable To Their Arbitrations

In *Concepcion*, the Court explained that "[t]he 'principal purpose' of the FAA is to 'ensure that private arbitration agreements are enforced according to their terms.' " *Concepcion*, 131 S. Ct. at 1748. Under the FAA, parties enjoy the freedom "to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes." *Id.* at 1748-1749 (citations omitted). "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.*

In explaining why the *Discover Bank* rule was an obstacle to this objective, the Court took notice of the fact that the California rule effectively conditioned the availability of arbitration on parties agreeing to permit class-wide arbitration. *Concepcion*, 131 S. Ct. at 1744. This is important because class-wide arbitration is fundamentally different from bilateral arbitration. *Concepcion*, 131 S. Ct. at 1749-1752. Class-wide arbitration sacrifices the informality of bilateral arbitration,

requires procedural formality, and exponentially increases the risk of error, making it an unacceptable alternative for defendants. *Id.* Because of these fundamental changes, the Court concluded that permitting state laws to impose class-wide arbitration on parties without their consent is inconsistent with Congress's objectives in enacting the FAA. *Id.* at 1751 ("The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.").

The Court was careful to point out, however, that if parties actually agree to class-wide arbitration, the FAA will nonetheless require enforcement of such agreements. *Concepcion*, 131 S. Ct. at 1752-1753. Thus, even though class-wide arbitration is inconsistent with the type of arbitration envisioned by Congress, it is incompatible with the FAA only if it is imposed on parties by state law without the parties' consent:

> Parties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. [citation] But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

Id.

The Court's reasoning in *Concepcion* leads to two inescapable conclusions. First, the objective to

which the *Discover Bank* rule was an obstacle was Congress's goal of granting parties the freedom to determine which terms should be included in their arbitration agreements, in order to facilitate the creation of streamlined proceedings tailored to parties' particular needs. *See Concepcion*, 131 S. Ct. at 1748-1749. Second, the *Discover Bank* rule was an obstacle to this objective – not merely because it imposed procedures inconsistent with the type of arbitration envisioned by Congress – but because it did so without the parties' consent. *Concepcion*, 131 S. Ct. at 1751 (emphasis added) ("class arbitration, *to the extent* it is manufactured by *Discover Bank rather than consensual*, is inconsistent with the FAA").

B. Enforcing Agreed-Upon Terms Does Not Interfere With The Achievement Of Congress's Objectives

In this case, state law is not imposing any arbitration rules, procedures, or conditions on the parties to which they did not expressly agree. The fact that the arbitration agreement contains a poison-pill clause is solely the result of the parties' agreed-upon bargain. Joint Appendix ("JA"), 128-129, § 9(c). Similarly, it is the parties' agreement (and not state law) that specifies when the poison-pill clause should be triggered and which laws must be applied to determine whether it will be triggered. *Id.* ("If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.").

In analyzing whether California's anti-class-waiver laws are an obstacle to the achievement of Congress's objectives in this case, it is imperative to

remember that when parties actually agree that specific rules and procedures should apply to their arbitrations, the parties' agreement disposes of the issue of whether such rules and procedures interfere with the FAA's goals. *Concepcion*, 131 S. Ct. at 1752-1753 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."); *see Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 470, 477-479 (1989) (parties' agreement that entire contract governed by California law rendered moot the issue of whether a state law requiring the denial of a petition to compel arbitration conflicted with the FAA). Or, to put it another way: terms that parties have agreed to include in their arbitration agreements cannot be an obstacle to the objective of allowing parties to determine, by agreement, which terms their arbitration agreements should include.

Since the parties in this case expressly agreed that California's laws govern the determination of whether the class-action waiver is enforceable, the application of California law, in the manner and to the extent that the parties agreed that it should apply, does not interfere in even the slightest degree with the achievement of Congress's goals in enacting the FAA. As a result, obstacle preemption does not arise in this case.

C. The Agreement Must Be Interpreted To Mean What A Reasonable Consumer Would Think That It Means

Petitioner also argues that the arbitration clause at issue here supposedly "reflects an unmistakable intent to arbitrate disputes unless state law would force the parties into class

arbitration."[3] Brief for Petitioner, 10. However, that is not how the California Court of Appeal interpreted the agreement (*see Imburgia v. DIRECTV, Inc.*, 225 Cal.App.4th 338, 343-347 (2014)), and this Court generally does not review state courts' interpretations of private contracts. *Volt*, 489 U.S. at 474; *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 60 n.4 (1995).

Moreover, Petitioner's argument is materially identical to the arguments that were asserted – and rejected – in the wake of this Court's opinion in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which reversed the prior ruling in *Wilko v. Swan*, 346 U.S. 427 (1953). Specifically, in *Wilko* the Court ruled that the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*) (the "Securities Act") prohibited and declared void agreements to arbitrate claims arising under the Securities Act. *Wilko*, 346 U.S. at 433-438. As a result, after *Wilko*, many arbitration agreements contained clauses stating that, notwithstanding the general agreement to arbitrate, the parties were not agreeing to arbitrate Securities Act claims. *See* e.g., *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d

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[3] It is worth noting that Petitioner's arbitration agreement plainly does not require arbitration of all disputes between the parties. JA, 129, § 9(d) (list of claims that may only be adjudicated by a court). Further, even if the agreement required arbitration of all disputes (which it does not), the fact that the poison-pill clause appears in a subsection titled "Special Rules" (*Id.* at 128-129, § 9(c)) demonstrates that the parties intended it to be an exception to the agreement's general rules. *See* OXFORD UNIV. PRESS, NEW OXFORD AMERICAN DICTIONARY 1675 (Angus Stevenson & Christine A. Lindberg eds., 3rd ed. 2010) (emphasis added) ("special" means "better, greater, or *otherwise different from what is usual*").

729, 734 (3d Cir. 1989) (arbitration agreement included clause stating "I am aware that this arbitration provision is not binding upon me in any dispute or controversy that arises under the federal securities laws."). When the Court issued its decision in *Rodriguez*, reversing *Wilko* and ruling that the FAA can require the arbitration of Securities Act claims (*Rodriguez*, 490 U.S. at 479-484), the federal courts encountered a series of cases in which one of the parties argued that, in spite of a clause excluding Securities Act claims from the agreement to arbitrate, the reversal of *Wilko* meant that parties could now compel arbitration of such claims. *See* e.g., *Ballay*, 878 F.2d at 734; *Goldberg v. Bear, Stearns & Co.*, 912 F.2d 1418, 1419-1420 (11th Cir. 1990); *Gooding v. Shearson Lehman Bros., Inc.*, 878 F.2d 281, 283-284 (9th Cir. 1989). In these cases, the proponents of arbitration argued (as Petitioner attempts to do here) that their arbitration agreements supposedly evidenced the parties' intentions to arbitrate all disputes. *Id.* With regard to the clauses excluding Securities Act claims, it was argued that such clauses were simply an acknowledgment that the parties did not intend to contravene any limits imposed by applicable law. *Id.* However, the federal appellate courts uniformly rejected such arguments, ruling instead that exclusionary language in arbitration clauses must be interpreted and enforced in an ordinary manner. *Id.* In particular, the meaning of exclusionary clauses must be determined based on how consumers reading such clauses would interpret them – not based on the drafters' unilateral reasons for including them in their arbitration agreements in the first place. *Ballay*, 878 F.2d at 734 ("A customer reading the exclusionary language could not be expected to be aware of the regulatory

background or to understand that the language may become meaningless with the winds of change in the law."); *Goldberg*, 912 F.2d at 1419 ("Regardless of the reason for the inclusion of the language ... the parties are bound by what they agreed to do."); *Gooding*, 878 F.2d at 284 ("The undisclosed intentions of the parties are ... immaterial ... the outward manifestation or expression of assent is controlling.").

Thus, Petitioner's motives for including a poison-pill clause in its arbitration agreement, and its characterization of the supposed intent of that clause, do not determine how it should be construed. Instead, it must be construed to mean what a reasonable consumer reading it would think that it means. *Ballay*, 878 F.2d at 734; *Goldberg*, 912 F.2d at 1419; *Gooding*, 878 F.2d at 284. Generally applicable California contract law (which governs the construction of the arbitration agreement at issue here)[4] is in accord. Under California law, contract terms must be construed based on an objective assessment of what the promisee reasonably understood them to mean. Cal. Civ. Code § 1649; *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1264-1265 (1992).

In this case, any consumer reading the arbitration agreement in Petitioner's adhesion contract would not be aware of Petitioner's motives

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[4] *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not ... in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law"); *Volt*, 489 U.S. at 475-476 (general state-law contract interpretation principles apply to arbitration agreements).

for including the poison-pill clause. Consumers would interpret the poison-pill clause to mean just what it says: that neither party is entitled to compel arbitration in cases in which the class-action waiver is unenforceable under any of California's laws. JA, 128-129, § 9(c) ("If ... the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable."). Because this is how consumers would interpret the poison-pill clause, this is the agreement by which Respondents are bound. Cal. Civ. Code § 1649; *Bank of the West*, 2 Cal.4th at 1264-1265; *Ballay*, 878 F.2d at 734; *Goldberg*, 912 F.2d at 1419; *Gooding*, 878 F.2d at 284.

IV. CONCLUSION

For the reasons stated herein, Amicus respectfully submits that the Court should affirm the ruling of the California Court of Appeal.

Amicus humbly thanks the Court for its time and consideration.

July 23, 2015

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No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, *et al.*,

Respondents.

On Writ of Certiorari to the California Court of Appeal Second District

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. The Court Should Enforce the Parties' Agreement According to Its Terms 7

A. Federal Arbitration Law Is Based On Freedom of Contract 8

B. The Parties' Binding Agreement to Arbitrate Should Be Enforced 11

1. The parties never would have specified that their arbitration agreement is governed by the FAA if they intended to bind themselves to state law inconsistent with the FAA 12

2. The appeals court's ruling betrays a deeply flawed understanding of preemption under the FAA 14

II. The Decision Below Rests on a Fundamental Misunderstanding of the Interplay Between State and Federal Law 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES:

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 8, 10, 15

Arthur Andersen LLP v. Carlisle,
556 U.S. 624 (2009) 1

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 4, 6, 9, 12, 14, 15

AT&T Tech., Inc. v. Commc'ns Workers of Am.,
475 U.S. 643 (1986) 10

Barvati v. Josephthal, Lyon & Ross, Inc.,
28 F.3d 704 (7th Cir. 1994) 9

Boghos v. Certain Underwriters at Lloyd's of London, 36 Cal. 4th 495 (2005) 13

Brown v. Ralph's Grocery Co.,
128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011) 4

Claflin v. Houseman,
93 U.S. 130 (1876) 17, 18

CompuCredit Corp. v. Greenwood,
132 S. Ct. 665 (2012) 9

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193 (2000) 9

Page(s)

Discover Bank v. Superior Ct.,
36 Cal. 4th 148 (Cal. 2005) 4

Gilmer v. Interstate/ Johnson Lane Corp.,
500 U.S. 20 (1991) 8

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 1

Haywood v. Drown,
556 U.S. 729 (2009) 17, 18

Howlett v. Rose,
496 U.S. 356 (1990) 17, 18

John Wiley & Sons, Inc. v. Livingston,
376 U.S. 543 (1964) 11

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 13

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 8, 10

Mondou v. New York, N.H. & H. R.R.,
223 U.S. 1 (1912) 16, 18

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 10, 15

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 5, 14, 15

Page(s)

Mut. Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 16

People v. Sischo,
144 P.2d 785 (Cal. 1943) 18, 19

Southland Corp. v. Keating,
465 U.S. 1 (1984) 10, 11

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 6, 7

Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468 (1989)..... 7, 9, 15

Yellow Freight Sys., Inc. v. Donnelly,
494 U.S. 820 (1990) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. art. VI, cl. 2 14

STATUTES

9 U.S.C. § 2 8

OTHER AUTHORITIES

Mark C. Morril,
Party Autonomy Reigns Supreme: Arbitration & Class Actions in the High Court's October 2012 Term, WLF LEGAL BACKGROUNDER
(Sep. 13, 2013) 1

Page(s)

Andrew J. Pincus & Evan M. Tager,
Arbitration after AT&T v. Concepcion*: Judicial, Regulatory, & Strategic Legal Responses to the High Court's 2011 Ruling*, WLF WEB SEMINAR (May 8, 2012) 1

INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual and business civil liberties, a limited, accountable government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* before this and other federal courts to support the rights of private parties to enter into binding agreements to arbitrate disputes arising between them, as a quicker and more efficient alternative to civil litigation. *See, e.g.*, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently produces articles and sponsors media briefings on a variety of legal issues related to arbitration. *See, e.g.*, Mark C. Morril, *Party Autonomy Reigns Supreme: Arbitration & Class Actions in the High Court's October 2012 Term*, WLF LEGAL BACKGROUNDER (Sep. 13, 2013); Andrew J. Pincus & Evan M. Tager, *Arbitration after* AT&T v. Concepcion*: Judicial, Regulatory, & Strategic Legal Responses to the High Court's 2011*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; blanket letters of consent have been lodged with the Clerk.

Ruling, WLF WEB SEMINAR (May 8, 2012).

WLF believes that the California Court of Appeal's refusal to enforce the parties' agreement to arbitrate their dispute represents an ill-conceived departure from settled law and undermines the sound policies of the Federal Arbitration Act. In addition to openly flouting this Court's precedents, the holding below promotes precisely the type of protracted litigation disfavored by federal law and which the parties' agreement was designed to avoid. If allowed to stand, the appeals court's decision will impede and potentially deny a host of parties the right to arbitrate their disputes when the governing law would otherwise entitle them to do so, imposing substantial costs on those who voluntarily seek to resolve disputes through arbitration. Because these increased costs will ultimately be borne by consumers and society as a whole, WLF urges the Court to reverse the decision below.

STATEMENT OF THE CASE

Petitioner DIRECTV is a leading broadcast satellite service provider that broadcasts, through satellite transmissions, licensed video and audio programming to paid subscribers. DIRECTV's standard customer agreement, which sets forth the basic terms and conditions of DIRECTV's service, contains an arbitration provision (Section 9) that states "if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated ... and under the Rules set forth in this Agreement." Pet. App. 4a.

The arbitration provision further specifies that "[n]either you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." Pet. App. 5a.

DIRECTV's customer agreement also contains a choice-of-law provision (Section 10(c)), which provides in relevant part that "Section 9 shall be governed by the Federal Arbitration Act." Pet. App. 5a. As relevant here, Section 10(d) of the customer agreement contains a standard severability clause, which states: "If any provision is declared by a competent authority to be invalid, that provision will be deleted or modified to the extent necessary, and the rest of the Agreement will remain enforceable."

In 2008, Respondents filed separate putative class-action lawsuits against DIRECTV alleging that DIRECTV violated California law by charging Respondents an early cancellation fee when they prematurely cancelled their service. Pet. App. 3a. The cases were later consolidated in Los Angeles Superior Court. *Id.*

At the time of Respondents' suits in 2008, the California Supreme Court had adopted a rule that invalidated as unconscionable (under California law) nearly all consumer arbitration agreements

containing class-action waivers. *See Discover Bank v. Superior Ct.*, 36 Cal. 4th 148, 157-63 (Cal. 2005). Accordingly, DIRECTV did not move to compel arbitration after the suits were filed, but proceeded in court until 2011, when this Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that a state law requiring the availability of class-wide arbitration "interferes with fundamental attributes of arbitration" and thus is preempted by the Federal Arbitration Act (FAA). 131 S. Ct. at 1748.

Following this Court's opinion in *Concepcion*, DIRECTV moved to compel arbitration consistent with Section 9 of the customer agreement. The Los Angeles Superior Court denied the motion, concluding that the arbitration provision was unenforceable under *Brown v. Ralph's Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), a representative action alleging labor code violations under California's Private Attorney General Act of 2004. Pet. App. 17a-20a.

On appeal, the California Court of Appeal affirmed on different grounds. Pet. App. 2a-16a. The Court's opinion relied on the arbitration provision's non-severability clause, which stipulates that if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." *Id.* at 6a. The appeals court interpreted the phrase "the law of your state" to mean "the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA." *Id.* at 14a. In other words, the Court concluded that Section 9's non-severability clause

required application of California law, even if contrary to federal law, and even if contrary to the customer agreement's own choice-of-law provision, which explicitly states that "Section 9 shall be governed by the Federal Arbitration Act." *Id.* Accordingly, the appeals court found the class-action waiver invalid under California law and then refused to enforce the arbitration agreement based on the non-severability clause. *Id.* at 15a.

The Court of Appeal did not dispute that its holding directly conflicted with the Ninth Circuit's prior decision in *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013), which interpreted the same language in the same arbitration agreement at issue here as *requiring* arbitration and dismissed as "nonsensical" the very reasoning adopted by the Court of Appeal. Rather, the Court of Appeal dismissed the Ninth Circuit's decision as "unpersuasive," insisting that "*Murphy* provides no basis for concluding that the parties intended to use the phrase 'the law of your state'" to mean ordinary state law subject to the Supremacy Clause. Pet. App. 13a.

DIRECTV petitioned the California Supreme Court to resolve the resulting conflict between the California Court of Appeal and the Ninth Circuit. Over Justice Baxter's dissent, the California Supreme Court denied review. Pet. App. 1a.

SUMMARY OF ARGUMENT

In domestic and international commerce, countless parties depend upon the availability of arbitration as a means for controlling costs, streamlining processes, and lending certainty to contractual relationships. Congress and the federal courts have recognized the important public policy values inherent in arbitration and have acted affirmatively to further them. Here, the California Court of Appeal's contumacious refusal to enforce the parties' unequivocal agreement to arbitrate their dispute undermines those important values and should be reversed.

Courts must enforce arbitration agreements, like all other contracts, according to their terms. Because the parties to this case expressly agreed to arbitrate their disputes through binding arbitration, rather than through litigation, the courts below should have compelled Respondents to arbitrate their claims. Instead, the California Court of Appeal contrived a highly idiosyncratic reading of the phrase "the law of your state" in the arbitration agreement's non-severability clause to find the entire arbitration agreement unenforceable. This interpretation cannot withstand even the slightest scrutiny. It not only ignores the clear "contractual rights and expectations of the parties," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010), but it also flies in the face of basic principles of federal preemption. Indeed, this Court has already decided that the FAA preempts any "state law" that would invalidate a consumer arbitration agreement because it contains a class-action waiver. *Concepcion*, 131 S. Ct. at 1748.

Moreover, the appeals court's conclusion that "the law of your state" means "the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA," Pet. App. 14a, betrays a fundamental misunderstanding of state and federal law. Strictly speaking, there is no such thing as abstract "state law," free from the preemptive force of federal law. Because state law that has been preempted is a legal nullity, it is not "law" in any meaningful sense of the word. More fundamentally, this Court has long made clear that federal law is as much the "law of the several States" as are the laws passed by state legislatures. Although the FAA was adopted by Congress and not the California state legislature, it is just as much a part of California law as the California civil code. Because the FAA is unquestionably part of the "Law of the Land" in California, the California Court of Appeal's holding below was clearly erroneous and should be reversed.

ARGUMENT

I. The Court Should Enforce the Parties' Agreement According to Its Terms

A court confronted with an arbitration agreement must "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen*, 559 U.S. at 682. Arbitration agreements, like all other contracts, must be enforced according to their terms. *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 469 (1989) ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."). Here, it is undisputed that the

DIRECTV customer agreement's choice-of-law provision requires that the parties' arbitration agreement "shall be governed by the Federal Arbitration Act." Pet. App. 5a. The FAA provides that an agreement to arbitrate arising from a transaction in interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court's prior cases have confirmed that a court asked to compel arbitration has the limited task of determining whether the parties' dispute is within the scope of a valid arbitration agreement. If the parties agreed to arbitrate the dispute, that is the end of the matter, and the court must honor the parties' agreement.

For reasons explained below, the appeals court's refusal to honor the parties' agreement to arbitrate departs wildly from this Court's precedents and should be reversed.

A. Federal Arbitration Law Is Based On Freedom of Contract

The most fundamental precept of federal arbitration law is freedom of contract. Indeed, the singular purpose of the FAA is "to overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 838 (1995), by placing those agreements on "the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA thus creates "at bottom a policy guaranteeing the enforcement of private contractual agreements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Accordingly, this

Court has long held that courts must "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478; *Concepcion*, 131 S. Ct. at 1752 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations.") (citation omitted).

It is likewise understood that parties "are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 469 (citations omitted); *see also Barvati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 409 (7th Cir. 1994) ("[P]arties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."). "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 131 S. Ct. at 1749. Accordingly, this Court has never hesitated to give full effect to "the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479 (noting that courts must "rigorously enforce" arbitration agreements according to their terms); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (requiring "courts to enforce agreements to arbitrate according to their terms").

And because federal law requires "rapid and unobstructed enforcement of arbitration agreements," a court's role in determining arbitrability is limited. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 201 (2000) (internal quotation omitted). When asked to compel arbitration of a particular dispute, a court must determine whether the dispute is within the scope of

a valid arbitration agreement. *See Mitsubishi*, 473 U.S. at 626. If it is, the court's work is done—it must refer the dispute to arbitration. As this Court has emphasized repeatedly, "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

In the absence of "fraud or overwhelming economic power that would provide grounds "for the revocation of any contract,'" *Mitsubishi*, 473 U.S. at 627, all doubts concerning the applicable scope of an arbitration agreement "should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Having made "a bargain to arbitrate, ... part[ies] should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628. Otherwise, this Court has recognized that arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible [to] an interpretation that covers the asserted dispute." *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (internal quotation omitted).

Consistent with longstanding freedom-of-contract principles, a court may not rewrite the parties' agreement by usurping the role assigned to the arbitrator. Nor may a court "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix*, 513 U.S. at 281. In this vein, a court asked to compel arbitration is precluded from delving into the

"potential merits of the [parties'] underlying claims." *Id.* at 649. Other than determining which disputes are within the scope of arbitration, a court has no authority to interpret the provisions of the parties' substantive agreement. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) ("'[P]rocedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."). As this Court has noted, "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7.

B. The Parties' Binding Agreement to Arbitrate Should Be Enforced

In this case, application of this Court's settled principles is straightforward. It is undisputed that the customer agreement between Petitioner and Respondents contains a binding arbitration provision, which provides "if we cannot resolve a Claim informally, any Claim either of us asserts will be resolved *only* by binding arbitration." Pet. App. 4a (emphasis added). Nor do Respondents dispute that their legal challenge to DIRECTV's early cancellation fee constitutes precisely the sort of "Claim" expressly contemplated by the agreement.

The parties' arbitration provision further specifies that "[n]either you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney capacity." *Id.* at 5a. To eliminate any possibility of class-wide arbitration, the parties

included the following non-severability clause: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable." *Id.* Accordingly, because the language of the agreement is sufficiently broad to cover Respondents' claim, and because Respondents are foreclosed from proceeding as a class, the appeals court should have enforced the parties' agreement and compelled Respondents to arbitrate their claims individually.

Respondents avoided this straightforward result by convincing the appeals court that the phrase "the law of your state" in the arbitration agreement's non-severability clause means "the law of your state *without considering* the preemptive effect, if any, of the FAA." *Id.* at 8a (emphasis added). The appeals court then went on to apply California law—which this Court in *Concepcion* squarely held was preempted by the FAA—to find the parties' entire arbitration agreement unenforceable under the non-severability clause. This interpretation is clearly erroneous for two basic reasons.

1. **The parties never would have specified that their arbitration agreement is governed by the FAA if they intended to bind themselves to state law inconsistent with the FAA.**

By effectively reading the parties' choice-of-law provision—which provides "Section 9 shall be governed by the Federal Arbitration Act," Pet. App.

5a—out of the parties' agreement, the appeals court's ruling violates basic principles of contract interpretation. In order to circumvent the parties' choice-of-law selection, the appeals court concluded that preempted California law should apply, without regard to the FAA, because the reference to "the law of your state" in the non-severability provision is somehow more "particular and specific" than the express FAA choice-of-law provision in § 10(b). *See* Pet. App. 8a-9a ("[T]he particular and specific provision is paramount to the general provision."). But even under California law, that principle of contract construction applies *only* where "the provisions in question are truly inconsistent." *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 504 (2005).

Here, no inconsistency exists between the parties' selection of the FAA as the governing law of the arbitration agreement and the reference to the "law of your state" in the non-severability clause. This Court has consistently emphasized the "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The mere fact that the arbitration agreement's non-severability clause refers to "the law of your state" in no way permits the appeals court to simply ignore the express choice-of-law provision, which by its terms applies to the entirety of § 9, *including the non-severability clause* itself. Simply put, the parties never would have agreed to have their arbitration agreement governed by the FAA if they intended to bind

themselves to state law inconsistent with (and preempted by) the FAA.

Read in harmony, then, "the law of your state" applies only to the extent that it is consistent with the FAA. As the Ninth Circuit correctly concluded in construing the same language in the same arbitration agreement, "there is no conflict between the reference to 'the law of your state' in Section 9 of the Customer Agreement and the reference to the FAA in Section 10." *Murphy*, 724 F.3d at 1228. It is neither necessary nor appropriate for the appeals court to rewrite the parties' agreement to give Respondents benefits for which they did not bargain.

2. The appeals court's ruling betrays a deeply flawed understanding of preemption under the FAA.

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This Court has already decided under the Supremacy Clause that the FAA preempts any "state law" that would invalidate a consumer arbitration agreement because it contains a class-action waiver. *Concepcion*, 131 S. Ct. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). Simply put, "States cannot require a procedure that

is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* at 1753.

The Court has long recognized that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. Accordingly, "in applying general state-law principles of contact interpretation to the interpretation of an arbitration agreement ... due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 475-76 (internal quotations omitted).

By construing "the law of your state" to mean California state law in an imaginary legal universe in which the Supremacy Clause does not exist, the appeals court placed the parties' arbitration agreement "on an 'unequal footing,' directly contrary to the Act's language and Congress'[s] intent." *Allied-Bruce Terminix*, 513 U.S. at 281. In doing so, the court radically transformed a provision manifesting the parties' unmistakable intent to *ensure* that their arbitration agreement would be interpreted and enforced in a manner consistent with the FAA into a poison pill that would *preclude* operation of the FAA altogether. That interpretation, as the Ninth Circuit has recognized, is "nonsensical." *Murphy*, 724 F.3d at 1226. Because the California Court of Appeal's refusal to defer to the parties' choice of law reflects precisely the type of "judicial suspicion of the desirability of arbitration" that this Court long ago rejected, *Mitsubishi*, 473 U.S. at 626-27, the decision below should be reversed.

II. The Decision Below Rests on a Fundamental Misunderstanding of the Interplay Between State and Federal Law

At bottom, the California Court of Appeal's decision in this case rests entirely on its tendentious construction of the phrase "the law of your state" to mean "the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA." Pet. App. 14a. But that interpretation "presupposes what in legal contemplation does not exist." *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 57 (1912). Contrary to the view of the appeals court, there is simply no such thing as hermetically sealed "state law," immune from the preemptive force of federal law. To begin with, "it has long been settled that state laws that conflict with federal law are *without effect*." *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (emphasis added). Because state law that has been preempted is a legal nullity, it is not "law" in any meaningful sense of the word. Of course, the interpretation of arbitration agreements governed by the FAA routinely involves a hybrid of both state *and* federal law, and this court has long recognized a "presumption of concurrent jurisdiction that lies at the core of our federal system." *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826 (1990).

In refusing to give effect to the parties' federal choice-of-law selection, the California Court of Appeal expressed a clear preference for the preempted state law of California over the federal law of the FAA, declining to give effect to the latter

because it differed substantively from the former. This Court has repeatedly refused to allow state courts to ignore federal law when construing state law. *Howlett v. Rose*, 496 U.S. 356 (1990) ("The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."). In other words, "although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies." *Haywood v. Drown*, 556 U.S. 729, 734 (2009).

In all events, the California Court of Appeal's conflating "state law" with "nonfederal law," Pet. App. 14a, reflects a fundamental misconception of the nature of laws adopted by Congress. As this Court has recognized, the "disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal government." *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). Although the FAA was adopted by Congress and not the California state legislature, it is just as much a part of California law as the California civil code. And "state courts as well as federal courts are entrusted with ... the vindication of federal rights." *Haywood*, 556 U.S. at 734. As this Court declared more than a century ago:

> The laws of the United States *are* laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. ... The

> two together form one system of jurisprudence, which constitutes the law for the State; and the Courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.

Claflin, 93 U.S. at 136-37 (emphasis added). More recently, the Court elaborated on the crucial interplay between state and federal law:

> Federal law is enforceable in state courts ... because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett, 496 U.S. at 367; *Haywood*, 556 U.S. at 734 ("This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures."); *Mondou*, 223 U.S. at 57 (congressional "policy is as much the policy of [a State] as if the act [of Congress] had emanated from its own legislature, and should be respected accordingly in the courts of the States."); *People v. Sischo*, 144 P.2d 785, 791-92 (Cal. 1943) (per curiam) ("The Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land to the

same extent as though expressly written into every state law.") (internal citation omitted).

Because the FAA is part of the "Law of the Land" in California, no reason exists to think that the parties chose to forgo their federal arbitration rights by reference to an *imaginary* state law immune from federal preemption as opposed to *actual* state law that necessarily includes the FAA. And because the FAA is just as binding on the citizens and courts of California as the State's own laws are, the California Court of Appeal's insubordinate holding below should be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the holding of the California Court of Appeal.

Respectfully submitted,

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No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF WILLIAM R. WEINSTEIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION..... 5

SUMMARY OF ARGUMENT.... 8

ARGUMENT... 12

I. In Enacting The FAA, Congress Preserved, And Did Not Preempt, The Common Law That Contracts Violating Statutes Enacted Under The State's Consumer Fraud Police Power Are Illegal, Void, Unenforceable And Revocable At Formation. .. .. .12

A. The State Police Power to Prevent Consumer Fraud, and to Render Contracts in Violation of Consumer Protection Statutes Illegal When Made, Was Firmly Established When Congress Enacted the FAA in 1925. ..12

B. Congress Incorporated, and Did Not Abrogate, the Common Law of Contracts, Including Illegal Contracts, When It Enacted the FAA in 1925. 16

Table of Contents

Page

1. The legislative history of the FAA corroborates Congress' intent not to preempt the application of the common law of illegal contracts to arbitration agreements. 18

2. Nothing in the FAA abrogates the application of the equitable common law of the class action remedy "to prevent a failure of justice" in connection with consumer fraud. 20

II. Federalism Principles Require The FAA To Be Construed Narrowly To Not Preempt California's Exercise Of The Police Power To Prevent And Remedy Consumer Fraud Committed Within Its Borders. 23

A. The Primacy of the State Consumer Fraud Police Power over "Liberty of Contract" Challenges under the Fourteenth Amendment Was Well-Established When the FAA Was Enacted. 23

B. The State's Exercise of the Police Power to "Impair" Contracts After Formation Notwithstanding the Contract Clause Was Sustained by the Court Before and After the Enactment of the FAA. 25

Table of Contents

Page

C. The Court's Modern Federalism Cases Prescribe that Congress' Purpose Be "Clear and Manifest" to Find the Exercise of the State Police Power Superseded by the FAA. 27

III. *Concepcion* Does Not Control FAA Preemption Of California's Exercise Of The State Police Power To Prevent And Remedy Consumer Fraud. 31

CONCLUSION 34

APPENDIX: California Consumers Legal Remedies Act, Cal. Civil Code §§ 1750, *et seq.* — Selected Provisions 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied-Bruce Terminix Cos., Inc. v. Dobson,
513 U.S. 265 (1995) 18, 19, 30

Armour & Co. v. North Dakota,
240 U.S. 510 (1916) 13, 24

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) .. .. *passim*

Berkovitz v. Arbib & Houlberg, Inc.,
230 N.Y. 261 (1921) 18, 19

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992). 10, 16, 27, 28, 31

Cohens v. Virginia,
19 U.S. 264 (1821) 11, 31

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 11, 27

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 10, 27

Emilio v. Sprint Spectrum L.P. d/b/a Sprint PCS,
No. 11-cv-3041, 2014 WL 902564
(S.D.N.Y. Feb. 11, 2014), *aff'd*, 582 F. App'x 63
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135 S. Ct. 1569 (2015) 3-4

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Page

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514 U.S. 938 (1995) .5

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251 U.S. 146 (1919) .13

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237 U.S. 662 (1915) .21

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248 U.S. 297 (1919) .13, 24

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290 U.S. 398 (1934) .10, 25, 26, 32

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209 U.S. 349 (1908) .14, 33

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242 U.S. 153 (1916) .13, 24

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264 U.S. 504 (1924) .25

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--- S. Ct. ---, 2015 WL 2473450
(U.S. June 26, 2015) .23

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584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.*
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131 S. Ct. 1740 (2011) .3

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Lochner v. New York, 198 U.S. 45 (1905). 23, 24, 25, 26

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Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88 (N.J. 2006) 1

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Obergefell v. Hodges, --- S. Ct. ---, 2015 WL 2473451 (U.S. June 26, 2015).. 23

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Perry v. Thomas, 482 U.S. 483 (1987)..... 5-6

Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912)..... 14

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Page

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487 U.S. 22 (1988) 27-28

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 3, 5

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255 U.S. 356 (1921), *overruled in part on other grounds by Toucey v. New York Life Ins. Co.*,
314 U.S. 118 (1941) 20, 21

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507 U.S. 529 (1993) 9, 16, 20

Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) 5, 20, 28, 30

Constitution and Statutes:

U.S. Const., Art. I, §10, cl. 1 ..... 10, 25

U.S. Const., Art. III, §1 29

U.S. Const., Amdt. X 13

U.S. Const., Amdt. XIV, §1 ..... 10, 23, 27

Class Action Fairness Act of 2005, Pub. L. No. 109-02, §2(a), 119 Stat. 4 (2005) 29

Page

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9 U.S.C. §2 .... *passim*

9 U.S.C. §4 17

9 U.S.C. §9 ... .4, 17

9 U.S.C. §10 ....4, 17

Fed. R. Civ. P. 23 . ... .22

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Cal. Civ. Code §1751 ....6, 7, 8, 14

Cal. Civ. Code §1756 ... .6, 32-33

Cal. Civ. Code §1770 ... .33

Cal. Civ. Code §1780 ... . .15, 33

Cal. Civ. Code §1781 .. .. .6, 15, 33

Cal. Civ. Code §1784 33

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Page

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§19:46 (4th ed. 2010).... 15

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Tr. of Oral Arg., *AT&T Mobility LLC v. Concepcion* (argued Nov. 9, 2010) 7

INTEREST OF *AMICUS CURIAE*[1]

Amicus is a private practitioner whose practice over the past fifteen years has substantially involved the prosecution of consumer class actions, and over the past ten years has evolved and is now firmly located at the intersection of the constitutional and common law contract principles implicated by the Federal Arbitration Act ("FAA"). Several of the matters litigated by *amicus* in recent years confirm his strong interest in the proper resolution of the issues presented in this case.

Amicus was lead counsel for the consumers in *Litman v. Cellco P'shp d/b/a Verizon Wireless*, 655 F.3d 225 (3d Cir. 2011), which was relied on by DIRECTV and distinguished by the California Court of Appeal in its opinion now the subject of these proceedings. Pet. App. 11a. In *Litman*, the Third Circuit originally held that the class action waiver in Verizon's arbitration agreement was unconscionable and unenforceable under the New Jersey law incorporated by the agreement's choice-of-law provision—specifically the New Jersey Supreme Court's decision in *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006). *Litman v. Cellco P'shp d/b/a Verizon Wireless*, 381 F. App'x 140 (3d Cir. 2010). Verizon petitioned this Court for a writ of certiorari, and after the issuance of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court granted Verizon's petition, vacated the Third Circuit's decision and remanded for further consideration

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1. *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* made a monetary contribution intended to fund the preparation or submission of the brief. The parties' consents to the filing of *amicus* briefs are on file with the Clerk's office.

in light of *Concepcion. Cellco P'shp d/b/a Verizon Wireless v. Litman*, No. 10-398, 131 S. Ct. 2872 (2011). On the same day, the Court also granted certiorari on Litman's cross-petition for which *amicus* was counsel of record, and which presented the following question substantially similar to the question presented in this matter:

> Whether the [FAA] requires the enforcement of a drafting party's express agreement not to arbitrate but to litigate in court if the class action ban in the arbitration agreement is unenforceable, where that party incorporates state law under its choice-of-law provision that contractual class action bans are unenforceable.

Litman v. Cellco P'shp d/b/a Verizon Wireless, No. 10-551, 131 S. Ct. 2873 (2011). On remand, the Third Circuit rejected Litman's argument that the application of the common law principles of contract construction to determine the intent of the parties at contract formation rendered the class action waiver unenforceable under New Jersey law. *Litman*, 655 F.3d 225, 231 n.8 (3d Cir. 2011). Litman's subsequent petition for a writ of certiorari filed by *amicus* as counsel of record and presenting the same question as before was denied by the Court. *Litman v. Cellco P'shp d/b/a Verizon Wireless*, No. 11-644, 132 S. Ct. 1046 (2012).

Amicus also was lead appellate counsel for the consumers in *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007), in which the Ninth Circuit upheld the application of *Discover Bank* to render the class action waiver in the arbitration agreement unconscionable and unenforceable, and held that *Discover*

Bank was not preempted by the FAA. *Shroyer* provided the essential precedential basis for the Ninth Circuit's decision in *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), which was reversed by *Concepcion*. *See Concepcion*, 131 S. Ct. at 1745 (citing *Shroyer*).

Amicus also has been lead counsel for the past ten years in *Emilio v. Sprint Spectrum L.P. d/b/a Sprint PCS*. *Emilio* was commenced as class action arbitration in 2005, and the gateway issue was the enforceability of the class action waiver in the arbitration agreement under the Kansas law incorporated by the agreement's choice-of-law provision—specifically, the Kansas Consumer Protection Act ("KCPA"), which (like the California Consumers Legal Remedies Act) expressly provides an aggrieved consumer with the right to pursue the "private remedy" of a class action for violations of the act, and expressly precludes the waiver by the consumer of the rights or benefits of the act. *See* KCPA 50-634 & KCPA 50-625, respectively. In 2006, the arbitrator—who was delegated the authority to decide jurisdictional, arbitrability and all other disputes by the arbitration agreement and the incorporated arbitration forum rules—decided that the class action waiver was unenforceable because of the unwaivable right under the KCPA to pursue the class action remedy. After substantial subsequent proceedings, Sprint moved in 2010 for reconsideration of the arbitrator's 2006 ruling in light of this Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). In her final award the arbitrator adhered to her prior ruling under the KCPA, and held that: (i) under *Stolt-Nielsen*, Sprint could not be compelled to engage in class-wide arbitration to which it did not agree; (ii) under the KCPA, Emilio could not be compelled to engage in bilateral arbitration to which

he did not agree; and (iii) therefore, the matter was not arbitrable, and Emilio must be given the opportunity to pursue his class claims in a court action. Emilio petitioned the District Court under 9 U.S.C. §9 to confirm the award in its entirety, and Sprint cross-petitioned under 9 U.S.C. §10 to partially vacate the part of the award favoring Emilio. The award ultimately was confirmed in its entirety by the District Court, and its decision was affirmed by the Second Circuit, substantially based on the deferential standard required under *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). *Emilio v. Sprint Spectrum L.P. d/b/a Sprint PCS*, No. 11-cv-3041, 2014 WL 902564 (S.D.N.Y. Feb. 11, 2014), *aff'd*, 582 F. App'x 63 (2d Cir. Nov. 12, 2014). Sprint's subsequent petition for a writ of certiorari regarding the Second Circuit's affirmance was denied by this Court on March 23, 2015, the same day that certiorari was granted in this case. *Sprint Spectrum L.P. d/b/a Sprint PCS v. Emilio*, No. 14-988, 135 S. Ct. 1569 (2015). *Emilio* is now in discovery proceedings in the District Court.

In this case, *amicus* respectfully submits that the anti-waiver provision of the California Consumers Legal Remedies Act—enacted by the People of California in furtherance of the State police power to prevent and remedy consumer fraud—is enforceable and not preempted under: (i) fundamental common law principles precluding the formation of illegal contracts violating consumer protection statutes; (ii) the text and legislative history of the FAA analyzed under the pertinent rules of statutory construction; and (iii) federalism principles analyzed under interrelated standards that the Court has applied for more than 100 years. Thus, the Court should affirm the opinion of the California Court of Appeal.

INTRODUCTION

In determining the enforceability of an arbitration agreement, certain fundamental principles are firmly ingrained within the "body of federal substantive law of arbitrability" created by the Court's FAA jurisprudence. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

One fundamental principle is that, "as with any other contract, the parties' intentions [and expectations] control." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). *See also Concepcion*, 131 S. Ct. at 1752-53; *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Mitsubishi*). Furthermore, in determining the parties' intentions and expectations, courts should "appl[y] general state-law principles of contract interpretation." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989). *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) (applying common law rules of construction that ambiguity is resolved against drafter, and that arbitration agreement "should be read to give effect to all its provisions and to render them consistent with each other").

Second, "[c]ourts generally ... should apply ordinary state-law principles that govern the formation of contracts" when deciding whether an agreement to arbitrate a certain matter exists. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 79 (2010) (quoting *First Options*). *See also Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("state law ... is applicable *if* that law arose to govern issues concerning the validity, revocability,

and enforceability of contracts generally") (emphasis in original). *Cf. Concepcion*, 131 S. Ct. at 1753, 1754-55 (Thomas, J., concurring) ("Reading §§2 & 4 harmoniously, the 'grounds ... for the revocation' preserved in §2 would mean grounds related to the making of the [arbitration] agreement" under §4 and "the formation of the agreement to arbitrate," i.e., grounds relating to "defects in the making of an agreement").

Here, §1781 of the California Consumers Legal Remedies Act ("CLRA"), enacted in 1970 (and included in Chapter 4 of the act, entitled "Remedies and Procedures"), expressly authorizes the consumer to pursue the remedy of a class action "if the unlawful method, act, or practice has caused damage to other consumers similarly situated." And CLRA §1751, also enacted in 1970, prohibits the waiver by the consumer of any and all of the provisions of the CLRA: "Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." *See* Cal. Stats. 1970, Ch. 1550; *see also* CLRA §1756 (provisions are "appl[icable] to actions filed on or after January 1, 1971"). (Select provisions of the CLRA are included in the Appendix to this brief.)

The parties' arbitration agreement (Section 9 of the Customer Agreement), however, includes a class action waiver; it also includes a "revocation clause" stating that "[i]f ... the law of your state would find [the class action waiver] unenforceable, then this entire [arbitration agreement] is unenforceable." Jt. App. 128-29 (Customer Agreement §9(c)(ii)). The choice-of-law provision in the Customer Agreement adds ambiguity (if not confusion) by stating that "[n]otwithstanding the [applicability of the laws of the state and local area where Service is provided

to you], Section 9 shall be governed by the [FAA]." Jt. App. 129 (Customer Agreement §10(b)).[2]

Under a reasonable reading of the plain language of the revocation clause, because the anti-waiver provision of CLRA §1751 renders the class action waiver unenforceable, the entire arbitration agreement is unenforceable. The California Court of Appeal applied general state-law principles of contract construction, as prescribed by the relevant decisions of the Court, to determine the parties' intentions regarding the meaning of the revocation clause in relation to CLRA §1751—concluding that the parties intended the CLRA to apply, and did not intend the revocation clause to be nullified by this Court's subsequently issued decision under the FAA in *Concepcion*. Pet. App. 6a-11a.

By contrast, the Ninth Circuit used the word "intention" only once in reaching a contrary conclusion about the proper construction of the same provision, *Murphy*, 724 F.3d at 1227, and determined that "many of the parties' various contract interpretation arguments are

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2. When *Concepcion* was decided, the revocation clause was known as a "blowout clause." *See* Tr. of *Concepcion* Oral Arg. at 33 (argued Nov. 9, 2010) (JUSTICE KENNEDY: "Suppose that this doesn't have what's called a blowout clause."). Although the Ninth Circuit refers to it as the "jettison clause," *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1224 (9th Cir. 2013), *amicus* is unaware of any other case using similar nomenclature. In any event, given the language of the saving clause of 9 U.S.C. §2, it is appropriate to call it what it is: a "revocation clause" that revokes the arbitration agreement and makes it "unenforceable" when the prescribed condition regarding the unenforceability of the class action waiver under "the law of your state" is satisfied.

largely irrelevant to our analysis," *id.* at 1228. Under the holding of the Ninth Circuit, the parties could *only* intend for the FAA to apply under the language of the revocation clause regardless of the narrower, more specific reference to "the law of your state"—even if the application of "general state-law principles of contract interpretation" would support a different, narrower construction. *Id.* at 1225-26. Stated differently, according to the Ninth Circuit, the revocation clause makes the agreement "irrevocable."

In construing the parties' arbitration agreement, both the California Court of Appeal and the Ninth Circuit took as a given that *Concepcion* nullified the CLRA anti-waiver provision—the principal contract issue was whether the revocation clause should be construed to include or exclude *Concepcion's* holding. But *amicus* respectfully submits that *Concepcion* does not control with respect to the exercise of the State police power by the People of California to prevent and remedy consumer fraud, and that the FAA does not preempt their decision to declare void and unenforceable *any* waiver by a consumer of the provisions of the CLRA—including but not limited to a waiver of the express statutory right to pursue the class action remedy for consumer fraud committed within the State that damages "other consumers similarly situated."

SUMMARY OF ARGUMENT

Offer, acceptance, consideration, capacity, and *legality*—essential elements for the formation of a contract.

That the anti-waiver provision of the CLRA, §1751, is enforceable and not preempted by the FAA is established

by the correlation and reconciliation of: (i) fundamental common law principles precluding the formation of illegal contracts, including those violating consumer protection statutes; (ii) the text of the FAA, including its saving clause contained in 9 U.S.C. §2, and the FAA legislative history; and (iii) federalism principles that require the State's exercise of its historic consumer fraud police power to be sustained when "plausible" against challenges under both constitutional provisions and acts of Congress.

The right of the State to render contracts illegal, void, unenforceable and revocable at formation in the exercise of its police power, including the police power to prevent and remedy consumer fraud, is a fundamental principle of the common law of contracts firmly established under an entire body of law by this Court when the FAA was enacted in 1925. Congress is presumed to legislate with "an expectation that [common law principles] will apply except when a statutory purpose to the contrary is evident," and "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quotations and citations omitted). Here, there is no need to "presume" that Congress intended the common law of illegal contracts to apply—the saving clause of 9 U.S.C. §2 incorporates it. The FAA legislative history also supports this conclusion. And because the FAA has nothing whatsoever to do with the State police power or consumer fraud, it cannot reasonably be read as abrogating the common law of illegal contracts in violation of statutes enacted in furtherance of that police power.

The "adherence to the common law" of illegal contracts under the FAA is mirrored and extended by federalism

principles based on the constitutional requirement of great deference to the exercise of the State police power, including the police power to render contracts in violation of consumer fraud statutes void, unenforceable and revocable. When the FAA was enacted in 1925, the right of the State to render contracts violating statutes enacted under the police power (including consumer fraud statutes) void, unenforceable and revocable at formation had been upheld a number of times by this Court against constitutional challenges based on "liberty of contract" under the Fourteenth Amendment (Amendment XIV, §1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"). And both before and after the passage of the FAA, the State police power to impair contracts *after* formation also was upheld by the Court against challenges under the Contract Clause (Article I, §10, cl. 1: "No State shall ... pass any ... Law impairing the Obligation of Contracts"). *See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Manigault v. Springs*, 199 U.S. 473 (1905).

The Court's modern federalism cases similarly counsel substantial deference to the exercise of the State police power, and assume that it is not to be preempted unless that is the "clear and manifest purpose of Congress." *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). *See also CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014) (Kennedy, J.) (preemption in areas traditionally governed by state police powers should presumptively be narrowly interpreted "where plausible"). Furthermore, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily

contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). The FAA regulates and preempts arbitration agreements, and the CLRA prohibits consumer fraud. There is no "proximity" between the statutes or any relationship whatsoever that could support a finding of Congress' intent to preempt California's exercise of the State police power to prevent and remedy consumer fraud.

Finally, *Concepcion* does not control the enforceability of the CLRA anti-waiver provision under the FAA, *inter alia*, because *Concepcion* did not involve or address (i) the fundamental common law principle that contracts violating statutes enacted under the State police power are illegal, void, unenforceable and revocable at contract formation, and (ii) the overriding federalism principles that favor upholding statutes enacted under the State's historical police powers. *E.g., Cohens v. Virginia*, 19 U.S. 264, 399 (1821). And because the FAA and its text have nothing to do with the State police power, the implied "purposes and objectives" conflict preemption on which *Concepcion's* holding is based, 131 S. Ct at 1753, is too far removed from, and thus cannot override the primacy of, the State consumer fraud police power over contracts that was firmly established when the FAA was enacted in 1925 and was preserved by Congress under 9 U.S.C. §2.

Insulating DIRECTV's revocation clause from the democratic exercise of the State police power by the People of California under the CLRA cannot be reconciled with Congress' intent in enacting the FAA and its fundamental purpose and design, which are reflected in the words of the statute as interpreted under the applicable rules of statutory construction, its historical context and federalism principles.

ARGUMENT

The prohibition against consumer fraud can be traced back more than two millennia, to biblical times. Leviticus 19:35 (New Int'l Version) prohibits the use of "dishonest standards when measuring length, weight or quantity," and Leviticus 19:36 (New Int'l Version) requires the use of "honest scales and honest weights, an honest ephah [dry measure approximating one bushel] and an honest hin [liquid measure approximating five liters]." *See also* http://biblehub.com/proverbs/11-1.htm (collecting biblical references) (last visited July 22, 2015). A consistent "finger on the scale" in the sale of goods (or services) has the capacity to deceive and damage every purchasing consumer, collectively inflicting widespread injury on the community. Prohibiting consumer fraud is not merely "policy," but an essential thread in the fabric of civilized society.

I. In Enacting The FAA, Congress Preserved, And Did Not Preempt, The Common Law That Contracts Violating Statutes Enacted Under The State's Consumer Fraud Police Power Are Illegal, Void, Unenforceable And Revocable At Formation.

A. The State Police Power to Prevent Consumer Fraud, and to Render Contracts in Violation of Consumer Protection Statutes Illegal When Made, Was Firmly Established When Congress Enacted the FAA in 1925.

When the FAA was enacted in 1925, the decisions of this Court firmly established that the State's police power included the power to prevent and remedy consumer

fraud. *See Hebe Co. v. Shaw*, 248 U.S. 297, 303 (1919) (prohibition on substitution of less valuable ingredients in condensed milk even if "improved"); *Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153 (1916) (consumer fraud statute prohibiting sale of ice cream with less than prescribed percentage of butter-fat), *id.* at 157 ("[t]he right of the State under the police power to regulate the sale of products with a view to preventing frauds" was conceded by plaintiff-in-error), *id.* at 159 ("Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power."); *Armour & Co. v. North Dakota*, 240 U.S. 510, 511, 513-14 (1916) (statute requiring standard bulk weight sale of lard); *Schmidinger v. City of Chicago*, 226 U.S. 578, 584-85, 587-88 (1913) (statute requiring standard weights and sizes for bread loaves). *Cf. McLean v. Arkansas*, 211 U.S. 539, 548, 550 (1909) (upholding statute prescribing precise methods for compensating miners based on weight or volume of coal actually mined). *See generally Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (Brandeis, J.) ("That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true.").[3]

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3. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *See also* The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961) (J. Madison):

> The powers delegated by the proposed Constitution to the federal government are few and defined. ... Those which are to remain in the State governments are numerous and indefinite. The powers reserved to the several States will extend to all the objects which,

These same cases also confirm that, when the FAA was enacted, it was a firmly-established, fundamental principle of the common law that illegal contracts in violation of the State's police power, including its power to prevent and remedy consumer fraud, were void, unenforceable and revocable at contract formation. *See also McLean*, 211 U.S. at 543 (upholding statute providing that "any provisions, contract, or agreement between mine owners, lessees, or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified or annulled shall be void and of no effect");[4] *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 197-98, 204-05 (1912) (upholding right of party to agreement for sale of non-alcoholic, non-intoxicating malt liquor to "repudiate [it] at the outset" after learning performance would be unlawful under Mississippi statute enacted as exercise of police power designed, in part, to prohibit defrauding by short measure). As stated by Justice Holmes in *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908):

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter. ... [T]he contract, the execution of which is sought to be prevented here, was illegal when it was made.

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in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

4. The inclusion of an anti-waiver provision like CLRA §1751 in statutes enacted under the State police power extends back more than 100 years.

Accord Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Canon 48: Penalty/ Illegality Canon, at 295 (2012) ("Scalia-Garner") (party cannot legally enter into contract violating statute with intention of paying penalty) ("Any such contract, being illegal, would be void.").

The law of California has been the same since long before the enactment of the FAA. *See Loving & Evans v. Blick*, 33 Cal. 2d 603, 607 (Cal. 1949) ("it has been repeatedly declared in this state that a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void" (quotation omitted)) (citing, e.g., *Chateau v. Singla*, 114 Cal. 191 (Cal. 1896)). The CLRA is just such a statute— providing an injured consumer with the right under §1780 to bring an action seeking legal and equitable remedies and penalties for violations of the act, including injunctive relief, restitution, actual and minimum damages, punitive damages, treble damages and additional penalties for prescribed violations under certain conditions, and an award of costs and attorneys' fees to a prevailing plaintiff—as well as the class action remedy under §1781. *See* Appendix. *See also* 8 Samuel Williston & Richard Lord, *A Treatise On The Law Of Contracts*, Miscellaneous Illegal Agreements, §19:46 at 550-51 (4th ed. 2010) (contracts that violate "statutes enacted as an exercise of the police powers of the state, designed 'to protect the public against fraud' ... are generally held to be void and unenforceable") (quoting *P.M. Palumbo, Jr., M.D., Inc. v. Bennett*, 242 Va. 248, 253 (Va. 1991)).

B. Congress Incorporated, and Did Not Abrogate, the Common Law of Contracts, Including Illegal Contracts, When It Enacted the FAA in 1925.

"[C]ourts may take it as a given that Congress has legislated with an expectation that [common law principles] will apply except when a statutory purpose to the contrary is evident," and "[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. at 534 (quotations and citations omitted). *See also* Scalia-Garner, Canon 52: Presumption Against Change in Common Law, at 318 ("A statute will be construed to alter the common law only when that disposition is clear."). Here, there is no need to "presume" that Congress intended the common law of illegal contracts to apply—the saving clause of 9 U.S.C. §2 incorporates it ("save upon such grounds as exist at law or in equity for the revocation of any contract"). And as the consumer fraud police power cases cited above confirm, the common law of illegal contracts involves all of the contract concepts identified in §2: validity, enforceability and revocability.

Because the FAA has nothing whatsoever to do with the State police power or consumer fraud, it cannot reasonably be read as "speaking directly to" or "abrogating" the common law of illegal contracts in violation of consumer fraud and other police power statutes. *United States v. Texas, supra.* Supporting this construction by analogy is *Cipollone*, 505 U.S. at 517:

> [A] variant of the familiar principle of *expressio unius est exclusio alterius* [is that] Congress'

> enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted

A variant on the variant that further supports the construction of §2 proposed by *amicus* is derived from the fact that, although Congress has prescribed four exceptions under 9 U.S.C. §10 to the confirmation of the arbitrator's award required under §9, and has prescribed an exception under §4 precluding a court from issuing an order compelling arbitration unless it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," Congress has stated no exception from the scope of the saving clause of §2 for the State's firmly established police power to render contracts made in violation of consumer fraud statutes void, unenforceable and revocable. As stated in Scalia-Garner, Canon 8, Omitted-Case Canon, at 93:

> [T]he judge [should not] elaborate unprovided-for exceptions to a text, as Justice Blackman noted while a circuit judge: "[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language." (quoting *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)).

1. The legislative history of the FAA corroborates Congress' intent not to preempt the application of the common law of illegal contracts to arbitration agreements.

In addition to statements and testimony, the FAA's legislative history also incorporates into the record a "brief" on the proposed statute. *Arbitration of Interstate Commercial Disputes, Joint Hearings on H.R. 646 and S. 1005 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess. 33-41 (1924) ("*Joint Hearings*"). The brief was submitted by Julius H. Cohen, the "drafter for the American Bar Association of much of the proposed bill's language." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274 (1995). Included in the brief, *Joint Hearings* 39, is a substantial quotation from the decision by then Judge Cardozo of the New York Court of Appeals in *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 270, 271-72 (1921), which addressed the New York arbitration statute of 1920, from which the FAA was substantially derived:

> We are told that the promise to arbitrate when made was illegal and a nullity. Even before the statute, this was not wholly true. Public policy was thought to forbid that the promise be specifically enforced. Public policy did not forbid an award of damages if it was broken. A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. ... *Of course, we exclude cases where the contract is inherently immoral or in contravention*

> *of a statute.* General contracts of arbitration were never subject to that reproach. (emphasis added)

Amicus submits that there are several reasons why the legislative history's incorporation of *Berkovitz* and Cohen's brief is entitled to substantial probative weight. *Berkovitz* is not "merely" the expressed view of a member of Congress or witness, but a judicial decision by Justice Cardozo on the state-law predecessor of the FAA—and thus, in effect, a part of the existing "common law" of *enforceable* arbitrations agreements (sparse though it may have been). Cohen's brief incorporating *Berkovitz* is a contemporaneous record of the intent and understanding of the individual who is generally regarded as the principal drafter of the FAA. His brief, including its reliance on *Berkovitz* and the above-quoted portion of the decision, is replicated in material part in Cohen's law review article regarding the FAA published the year following the FAA's enactment. Julius H. Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 283-84 (1926). And Cohen's testimony and his article have been relied on by many justices in the arbitration-related decisions of the Court. *See, e.g., Allied-Bruce,* 513 U.S. at 274, 279 (majority decision citing Cohen testimony); *id.* at 288 n.1 (dissenting opinion of Thomas, J., joined by Scalia, J., citing article). *See also Concepcion,* 131 S. Ct. at 1759 (Breyer, J., dissenting) (citing article).

2. Nothing in the FAA abrogates the application of the equitable common law of the class action remedy "to prevent a failure of justice" in connection with consumer fraud.

In addition to the explicit incorporation of the common law of contract formation regarding the validity, enforceability and revocability of an arbitration agreement, the FAA also incorporates the common law of contract construction to determine the intent of the parties, even though not expressly referenced in the statute. *E.g., Volt*, 489 U.S. at 475, *Mastrobuono*, 514 U.S. at 62-63. *See also United States v. Texas, supra.*

The equitable common law of the class action remedy, although not related to the common law of illegal contracts, also was well-established long before the FAA was enacted in 1925. "[C]lass suits were known before the adoption of our judicial system, and were in use in English chancery." *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921), *overruled in part on other grounds by Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941). What is generally regarded as the earliest statement by this Court of the propriety of the class suit is found in *Smith v. Swormstedt*, 57 U.S. 288, 302-03 (1853):

> The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

> *To prevent a failure of justice*, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained. ... *It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice.* (emphasis added)

Cases decided by this Court contemporaneously with the enactment of the FAA expressly approve the equitable use of the class remedy to bind all members. In *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 671-73 (1915), citing to *Smith v. Swormstedt* and a number of then more recent decisions, the Court determined that the class suit commenced in Connecticut under complete diversity by the plaintiffs "in their own behalf and on behalf of all others similarly situated" could bind all members of the class, including those who had not been parties. And in *Supreme Tribe of Ben-Hur*, issued four years before the enactment of the FAA and also quoting *Smith*, the Court held that, under Equity Rule 38 of the Court (which had been modified so the class decree could bind absent parties), the class decree could bind Indiana class members who otherwise would have destroyed diversity jurisdiction with respect to the Indiana company. 255 U.S. at 364-67.[5]

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5. Just as an injunction is an "equitable remedy" generally to prevent irreparable harm, so too is the aggregation of claims

Nothing in §2 or the remainder of the FAA "speaks directly to" or "abrogates" the equitable common law of the class action remedy. Regardless of whether that remedy is itself an independent ground "at law or in equity" for the revocation of any contract, there is no textual support for the preemption of the State's adoption of the class action remedy in the exercise of its police power to prevent and remedy consumer fraud, and its determination to render any waiver of that remedy void and unenforceable. Under the existing rules of statutory construction regarding the incorporation of the common law unaltered, Congress should not be presumed to have preempted a remedy necessary "to prevent the failure of justice" to the public in connection with a consumer fraud statute intended to prevent just such a failure of justice.

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for class adjudication an "equitable remedy" "to prevent a failure of justice." The use of either remedy is subject to prescribed procedural rules and standards, but when those are satisfied, the remedy will issue—in a class suit class-wide relief pursuant to a binding judgment. The true nature of the class suit as an equitable remedy has become blurred since the merger of equity and law into "one form of action—the civil action" after the adoption of the Federal Rules of Civil Procedure in 1937 and the current Fed. R. Civ. P. 23. *See also* Kansas Consumer Protection Act 50-634 (including right to pursue class action within "private remedies").

II. Federalism Principles Require The FAA To Be Construed Narrowly To Not Preempt California's Exercise Of The Police Power To Prevent And Remedy Consumer Fraud Committed Within Its Borders.

A. The Primacy of the State Consumer Fraud Police Power over "Liberty of Contract" Challenges under the Fourteenth Amendment Was Well-Established When the FAA Was Enacted.

Ironically, because the decision so frequently has been discredited by the Court—sometimes twice on the same day, *see Obergefell v. Hodges*, --- S. Ct. ---, 2015 WL 2473451 at *29-*30 (U.S. June 26, 2015) (Roberts, C. J., dissenting); *Johnson v. United States*, --- S. Ct. ---, 2015 WL 2473450 at *18 (U.S. June 26, 2015) (Thomas, J., concurring in judgment)—and because it was the harbinger of an era in which hundreds of state statutes were struck down, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down statute limiting employment of bakers to sixty hours weekly), actually provides a thorough statement of the standards that should have been applied to determine whether the exercise of the State police power would be preserved in the face of challenges based on the "liberty of contract" under the Fourteenth Amendment:

> The State ... has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not

> prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. *Id.* at 53-54.
>
> [W]here legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts[.] *Id.* at 56.
>
> This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. *Id.* at 56-57.

It is of great importance that, even though *Lochner* and its progeny far too frequently found the limits of the State police power exceeded, a number of cases prior to the enactment of the FAA during the *Lochner* era *upheld* the State's exercise of the police power to prevent consumer fraud. *See Hebe Co., supra; Hutchinson Ice Cream Co., supra; Armour & Co., supra; Schmidinger,* 226 U.S. at 588 ("courts may only interfere with laws or ordinances

passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred"). Not all consumer fraud statutes, however, escaped *Lochner*'s arbitrary reach. *Compare Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (striking down statute prescribing excess tolerance of two ounces for bread loaves at all allowable weights) *with Schmidinger, supra* (upholding statute requiring standard weights and sizes for bread loaves).

That the State's exercise of the police power to prevent and remedy consumer fraud regularly survived *Lochner* contemporaneously with the enactment of the FAA confirms the essential role of the State consumer fraud police power in our federal system, and undermines an implication that Congress intended under §2 to preempt any such legitimate exercise.

B. The State's Exercise of the Police Power to "Impair" Contracts After Formation Notwithstanding the Contract Clause Was Sustained by the Court Before and After the Enactment of the FAA.

Nine years after the passage of the FAA, the State police power to impair contracts *ex post*—after formation—was upheld by the Court against challenge under the Contract Clause. *Blaisdell*, 290 U.S. 398. In rejecting the Contract Clause challenge and finding the Maryland statute at issue to be "appropriate,' "reasonable" and "addressed to a legitimate end," *id.* at 445, *Blaisdell* identifies a number of cases where the exercise of the State police power was upheld notwithstanding having

the effect of impairing contracts. Among many decisions, *Blaisdell* (*id.* at 437) quotes *Manigault v. Springs*, 199 U.S. 473, 480 (1905)—one of a number of cited decisions substantially preceding the FAA's enactment, and a case decided the same year as and reported one volume after *Lochner*—to confirm the primacy of the State police power in connection with contracts between individuals:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.

Also pertinent is the following from *Blaisdell*, *id.* at 438 (citations omitted): "[W]here the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices."

There is a compelling parallel between the constitutional provision that expressly prohibits the States from impairing the obligation of contracts and the fact that "[t]he 'principal purpose' of the FAA is to

'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt*). The parallel extends as well to the "liberty of contract" under the Fourteenth Amendment. Because the State's right to exercise its police power to impair contracts when "appropriate," "reasonable" and "addressed to a legitimate end" was well-established when the FAA was enacted, and when that right has continued to be recognized by the Court thereafter, the historical context should guide this Court's construction of §2's saving clause so as to preserve the CLRA and its anti-waiver provision.

C. The Court's Modern Federalism Cases Prescribe that Congress' Purpose Be "Clear and Manifest" to Find the Exercise of the State Police Power Superseded by the FAA.

The Court's modern federalism cases similarly counsel substantial deference to the exercise of the State police power, and assume that it is not to be preempted unless that is the "clear and manifest purpose of Congress." *See, e.g., Cipollone*, 505 U.S. at 516; *Medtronic, Inc.*, 518 U.S. at 485. *See also CTS Corp.*, 134 S. Ct. at 2189 (preemption in areas traditionally governed by state police powers should presumptively be narrowly interpreted "where plausible"). Furthermore, "[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.*, 507 U.S. at 664.[6]

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6. Although Justice Scalia describes §2 as an "explicit pre-emption" provision, *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S.

The FAA regulates and preempts arbitration agreements, and the CLRA prohibits consumer fraud. There is no linkage whatsoever between arbitration agreements and the CLRA or its anti-waiver provision—a provision that applies to all of the provisions and remedies in the CLRA, and not just the class action remedy. The application of the CLRA to prevent and remedy consumer fraud is devoid of any "proximity" to the language and prescribed subject preempted under the FAA. "[W]hatever the source of the duty, [the CLRA] imposes [no] obligation in this case because of [arbitration agreements]." *Cipollone, id.* at 554 (Scalia, J., concurring in judgment in part and dissenting in part) (describing "'proximate application' methodology").

The Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-02 (enacted Feb. 18, 2005), also confirms the "appropriateness," "reasonableness" and "legitimacy" of the exercise of the police power by the People of California under the CLRA to provide consumers with the unwaivable right to pursue all remedies, including the class action remedy, for violations of the act, and firmly supports the "plausibility" of reading 9 U.S.C. §2

22, 37 (1988), *Volt* states that "[t]he FAA contains no express pre-emptive provision." 489 U.S. at 477. However, the FAA's declaration that arbitration agreements shall be "valid, irrevocable and enforceable" clearly displaces state law to the contrary. That this Congressional directive is immediately followed by an express saving clause strongly favors Justice Scalia's characterization over *Volt*'s contrary observation. Based on the saving clause alone, it is necessarily true that Congress has prescribed the limit to the scope of the preemptive reach of the statute, and that the language of §2 should be the primary focus in determining Congress' preemptive intent.

to not preempt that exercise. The findings of Congress in enacting CAFA are stated in §2(a), 119 Stat. 4, and provide in relevant part:

> (a) Findings.—Congress finds the following:
>
> (1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

And CAFA §2(b), 119 Stat. 5, sets out the purposes of CAFA, including to:

> (1) assure fair and prompt recoveries for class members with legitimate claims;
>
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and
>
> (3) benefit society by ... lowering consumer prices.

It would be paradoxical for Congress to have exercised its Article III, Section 1, power to vest the federal courts with diversity jurisdiction to adjudicate "an important and valuable part of the legal system" in connection with "interstate cases of national importance" for the express

benefit of consumers, but for this Court to find that the same choice by the People of California to remedy consumer fraud with its borders is preempted by a federal statute that says nothing about and has nothing to do with the State police power. Such a reading would be "implausible."

Congress' "clear and manifest purpose" under the FAA as stated in 9 U.S.C. §2 is elegantly straightforward:

> [T]he Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so."

Volt, 489 U.S. at 478 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). Similarly, the Court has "repeatedly referred to the Act's basic objective as assuring that courts treat arbitration agreements 'like all other contracts.'" *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting) (citing seven decisions).

Insofar as there is arguable uncertainty under §2, than as stated by Justice Thomas in his dissent in *Allied-Bruce*, 513 U.S. at 292, joined by Justice Scalia (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991)):

> [W]e should resolve the uncertainty in light of core principles of federalism ... "in areas traditionally regulated by the States." ... To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, we must be "absolutely certain" that Congress intended such displacement before we give preemptive effect to a federal statute.

"[T]he domain expressly pre-empted by" the FAA is arbitration agreements, and "the domain expressly" saved is the legal and equitable common law principles rendering any agreement illegal, void, unenforceable and revocable at formation—including as a result of the legislative exercise of State police power to prevent and remedy consumer fraud. *Cipollone*, 505 U.S. at 517. Preservation of the State police power, not preemption, is not merely a "plausible" construction of the FAA, but the only one.

III. *Concepcion* Does Not Control FAA Preemption Of California's Exercise Of The State Police Power To Prevent And Remedy Consumer Fraud.

Concepcion does not control the enforceability of the CLRA anti-waiver provision under the FAA, because *Concepcion* did not involve or address: (i) the fundamental common law principle that contracts violating statutes enacted under the State police power are illegal, void, unenforceable and revocable at contract formation; and (ii) the overriding federalism principles applied since before the FAA was enacted that favor upholding statutes enacted under the State's historic police powers, including in connection with consumer fraud. As stated by Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. 264, 399 (1821):

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

See also Blaisdell, 290 U.S. at 434 ("broad expressions ... beyond the requirements of the decision ... are not controlling") (citing *Cohens*).

Again, the text of the FAA lacks any proximity to the consumer fraud domain of the CLRA necessary to support the application of the implied "purposes and objectives" conflict preemption on which *Concepcion's* holding is based, 131 S. Ct at 1753. As a matter of federalism, there simply is no basis in the text of the statute, as supplemented by its legislative history and its historical context, to override the primacy of the State's exercise of its contract-related consumer fraud police power.[7]

Finally, the application of the CLRA and its anti-waiver provision to violations of the statute is materially factually distinguishable from elements of the *Discover Bank* rule that the Court found objectionable in *Concepcion*.

First, as opposed to the *ex post* application of the *Discover Bank* rule (*see* 131 S. Ct. at 1750), the provisions and prohibitions of the CLRA, including the anti-waiver provision, are applicable *ex ante*, at contract formation, and have been for more than four decades, since the CLRA and its class action remedy and anti-waiver provision were first enacted in 1970. *See* Cal. Stats. 1970, Ch. 1550; *see also* CLRA §1756 (provisions "appl[icable] to actions filed

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7. In his concurrence in *Concepcion*, Justice Thomas "adhere[ed] to [his] views on purposes-and-objectives pre-emption (citing *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (opinion concurring in judgment) ("implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution"). 131 S. Ct. at 1754. Thus, Justice Thomas disagreed with its application in *Concepcion*.

on or after January 1, 1971"). *Cf. Hudson Cnty. Water Co.*, 209 U.S. at 357 (Holmes, J.) ("One whose rights ... are subject to state restriction, cannot remove them from the power of the State by making a contract about them.").

Second, as opposed to the requirement of the *Discover Bank* rule that "damages be predictably small" which *Concepcion* characterized as "toothless and malleable," and the requirement that "the consumer allege a scheme to cheat consumers" which *Concepcion* characterized as "ha[ving] no limiting effect," 131 S. Ct. at 1750, the CLRA prescribes and identifies in advance in great detail in §1770 specific conduct violating the statute, and violations of the act do not depend on the amount of any one consumer's individual damages. The penalties imposed and remedies provided also are specified in advance, in §§1780-81, as are defenses available to one charged with violating the act, in §1784. *See* Appendix.

To hold that *Concepcion* applies to the CLRA and its anti-waiver provision would deprive the People of the State of California of the product of their democratic exercise of the State police power to decide how to prevent and remedy the commission of consumer fraud within its borders. To do so would violate the fundamental common law principles of illegal contracts that were firmly established when the FAA was enacted and which §2 and its saving clause incorporate. To do so would violate the fundamental federalism principles applicable to the exercise of the State police power established by the decisions of this Court extending back more than 100 years and also firmly established when the FAA was enacted. To do so would contravene Congress' intent in enacting the FAA, and its fundamental purpose and design reflected in the

words of the statute as interpreted under the applicable rules of statutory construction, its legislative history and historical context, and the command of federalism.

It would be *Lochnerian*.

CONCLUSION

For the foregoing reasons, the Court should affirm the opinion of the California Court of Appeal.

Respectfully submitted,

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APPENDIX

APPENDIX

CALIFORNIA CIVIL CODE SECTIONS 1750 *ET SEQ.* CONSUMERS LEGAL REMEDIES ACT— SELECTED PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

1750. This title may be cited as the Consumers Legal Remedies Act.

1751. Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.

1752. The provisions of this title are not exclusive. The remedies provided herein for violation of any section of this title or for conduct proscribed by any section of this title shall be in addition to any other procedures or remedies for any violation or conduct provided for in any other law. Nothing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions. Class actions by consumers brought under the specific provisions of Chapter 3 (commencing with Section 1770) of this title shall be governed exclusively by the provisions of Chapter 4 (commencing with Section 1780); however, this shall not be construed so as to deprive a consumer of any statutory or common law right to bring a class action without resort to this title. If any act or practice proscribed under this title also constitutes a cause of action in common law or a violation of another statute, the consumer may assert such common law or statutory cause of action under the procedures and with the remedies provided for in such law.

Appendix

1753. If any provision of this title or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the title and the application of such provision to other persons or circumstances shall not be affected thereby.

1756. The substantive and procedural provisions of this title shall only apply to actions filed on or after January 1, 1971.

CHAPTER 2. CONSTRUCTION AND DEFINITIONS

1760. This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.

CHAPTER 3. DECEPTIVE PRACTICES

1770. (Excerpt)

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(1) Passing off goods or services as those of another.

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

(3) Misrepresenting the affiliation, connection, or association with, or certification by, another.
(4) Using deceptive representations or designations of geographic origin in connection with goods or services.
(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.
(6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.
(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

[Subsections 8-23 omitted]

CHAPTER 4. REMEDIES AND PROCEDURES

1780. (Excerpt)

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against such person to recover or obtain any of the following:

(1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000).

(2) An order enjoining such methods, acts, or practices.

(3) Restitution of property.

(4) Punitive damages.

(5) Any other relief which the court deems proper.

(b) Any consumer who is a senior citizen or a disabled person ... may seek and be awarded, in addition to the remedies specified therein, up to five thousand dollars ($5,000) where the trier of fact (1) finds that the consumer has suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct, (2) makes an affirmative finding [under] Section 3345, and (3) finds that an additional award is appropriate. Judgment in a class action by senior citizens or disabled persons under Section 1781 may award each class member such an additional award where the trier of fact has made the foregoing findings.

* * *

(d) The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section. Reasonable attorney's fees may be awarded to a prevailing defendant upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.

Appendix

1781. (Excerpt)

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

1784. No award of damages may be given in any action based on a method, act, or practice declared to be unlawful by Section 1770 if the person alleged to have employed or committed such method, act, or practice

(a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and
(b) makes an appropriate correction, repair or replacement or other remedy of the goods and services according to the provisions of ... Section 1782.